IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-6852

WILLIE JAMES WILSON, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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QUESTIONS PRESENTED

I.

Whether the Georgia Supreme Court's affirmance of petitioner's death sentences in accordance with the court's pyramid interpretation of Georgia's capital sentencing scheme violates the fundamental principles of Furman v. Georgia and Stromberg v. California where the jury expressly relied upon an invalid aggravating circumstance in its decision to impose the death sentence.

II.

Whether Georgia's failure to explain the meaning, role, or significance of mitigating evidence in the sentencing instructions in a capital case--in contrast to the approach of all but one other state--provides sufficient guidance to a jury considering imposition of the death penalty.

III.

Whether the gross misconduct of petitioner's trial counsel, in effect pleading his client guilty during closing arguments (notwithstanding petitioner's trial testimony which, if believed, would have required conviction for noncapital offenses, and notwithstanding instructions to the jury by the trial court, based on petitioner's testimony, authorizing findings of voluntary manslaughter and self-defense) constitutes a plain error that renders petitioner's trial as a whole fundamentally unfair.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

Petitioner, Willie James Wilson, Jr., respectfully prays that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of Georgia, entered on the 1st day of March, 1983.

OPINION BELOW

The opinion of the Georgia Supreme Court (App. A) is reported at 250 GA. 630, 300 S.E.2d 640.

JURISDICTION

The judgment of the Georgia Supreme Court was entered on March 1, 1983. There was no petition for rehearing. Petitioner requested by motion an extension of time in which to file this Petition, and Justice Powell, on March 28, 1983, signed an order extending petitioner's time to file this Petition to and including May 30, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

Ga. Code Ann. §§ 17-10-30
17-10-35(c)(1)
27-2537

STATEMENT OF THE CASE

Petitioner Willie James Wilson, Jr., a black U.S. Army private stationed at Fort Stewart in Hinesville, Georgia, left his base and travelled to the predominantly white, rural community of Bristol, Georgia. In Bristol he was involved in the shooting of two well-known local residents, Alfred Boatright and Morris Highsmith. Petitioner subsequently was indicted on two counts of malice murder and one count of armed robbery.

Petitioner plead not guilty to the charges and exercised his right to have a jury determine his guilt or innocence. (Arraignment, 8/24/81, pp. 16-19) Despite the fact that the vast majority of the prospective jurors knew or knew of the victims or their families or were familiar with the facts of the case, petitioner's motion for a change of venue was denied. (tr. 1354-55)

At trial, the prosecution introduced evidence to show that petitioner planned to commit an armed robbery and that he killed the two men while robbing a small convenience store. Petitioner admitted firing the fatal shots and taking the money from the store, (Tr. 2161-62, 2365-66, 2424-32) but repeatedly denied that either the shooting or the taking was planned. (Tr. 2160-62, 2369, 2383-84, 2432) He maintained instead, both in a statement made to arresting officers and on direct and cross examination at trial, that the shooting grew out of a heated argument with the two attendants in the store that arose when he attempted to offer his pistol in exchange for gasoline. (Tr. 2160-61, 2364-66, 2423-24) During the argument petitioner was subjected to obscene language and derogatory racial epithets. (Tr. 2161, 2364-66, 2423)

Petitioner steadfastly maintained that it was only after this argument, and after he saw one of the two men bend down

behind the counter as if reaching for a weapon, that he fired his own gun to protect himself. (Tr. 2161, 2364-66, 2423-25) Petitioner admitted taking the money as an afterthought when he saw it lying in an open cash register after the shooting. (Tr. 2162, 2366-69, 2432)

Because of the gross misconduct of petitioner's trial counsel, the jury was never given an opportunity to consider petitioner's version of the case. Initially, counsel impliedly conceded petitioner's guilt during voir dire (Tr. 382, 451) and in his opening statement, (Tr. 1434-38) and then, incredibly, expressly instructed the jury to find petitioner guilty on both murder charges at the conclusion of his closing argument. (Tr. 2577) This concession of guilt was made notwithstanding petitioner's exculpatory testimony (supported by appropriate charges by the court to the jury on the lesser included offense of manslaughter (Tr. 2593) and the defense of self-defense). (Tr. 2591) Counsel's closing remarks left no doubt as to his own position and had the effect of pleading his client guilty:

> Ladies and gentlemen of the jury, you accept your responsibility. Find him guilty of count one and two [the murder counts]. But if you accept your responsibility on count three of the robbery of Alfred Boatright -- I took his life but I took nothing from him -- have to find him not guilty on that.

(Tr. 2577) (See Appendix G for counsel's entire closing argument.) Predictably, the jury returned a verdict of guilty on the two murder counts. (Tr. 2607)

The jury, having reached its verdict at 7:30 p.m. on Friday, February 5, was reconvened at 9:00 a.m. the next morning, Saturday, February 6, 1982, for the death penalty hearing. (Tr. 2621) The purpose of the hearing was to provide both the prosecution and defense with an opportunity to present additional evidence relevant to sentencing, so that the jury would be guided in its sentencing deliberations.

Prior to the presentation of evidence in aggravation and mitigation of punishment, the trial court convened a bench conference as required by the Georgia Unified Appeal Procedure. (Ga. Code § 17-10-36(b) and rules promulgated thereunder by the Georgia Supreme Court) (Tr. 2621) Petitioner's trial counsel objected to the trial court's proposed sentencing instructions on aggravating circumstances because the instructions would allow the jury to use each of the two murders in mutual aggravation of the other. (Tr. 2638) The objection was overruled and the proposed instructions were left unmodified. (Tr. 2650) The trial court ruled that even if the instructions to the sentencing jury were not proper the impropriety in the jury's finding of aggravating circumstances would be irrelevant if the jury found at least one "proper" statutory aggravating circumstance. (Tr. 2651)

At the sentencing hearing the prosecution argued for the death penalty, relying upon all of the evidence introduced at the guilt/innocence phase of the trial and petitioner's prior criminal record (one burglary at age 17 and other traffic and related offenses). (Tr. 2658, 2693-97)

Petitioner then offered, for purposes of mitigation, testimony from his father, (Tr. 2664-70) his mother, (Tr. 2671-75) his aunt, (Tr. 2676-82) and his former spouse, (Tr. 2682-89) each of whom stated petitioner was not a violent person. Each of these witnesses expressed a strong concern for petitioner's well-being and a desire that he not receive the death penalty. Petitioner also testified at the sentencing hearing. (Tr. 2689-2702) He expressed remorse about the deaths and briefly discussed his Army service and awards he received at Fort Benning, Georgia. (Tr. 2690-91)

Following the closing arguments of counsel, the trial court instructed the jury on the criteria for imposing the death penalty. (Tr. 2787-95) (See Appendix B) The court explained

both in oral and written instructions the use and categories of aggravating circumstances. (Tr. 2789-95) A significant portion of the charge concentrated on the instruction that resulted in simultaneous consideration of each murder in aggravation of the other. (Tr. 2789-91)

In contrast, the court failed to define or in any way explain the role of mitigating circumstances. The trial court merely repeated the following litany several times:

> [You shall consider] all of the evidence, facts and circumstances of this case which have appeared at both the guilt-innocence phase and the pre-sentencing phase of the trial in this case, including any and all evidence, facts and circumstances in extenuation, mitigation and aggravation of punishment.

(Tr. 2788-89, 2792, 2793, 2794)

The jury returned a sentence of death on both counts of murder. (Tr. 2801-03) (See Appendix C) The jury found two statutory aggravating circumstances: 1) that each murder was committed while the defendant was engaged in the commission of another capital felony (the other murder) and 2) that each murder was committed while the defendant was engaged in the commission of another capital felony (the armed robbery). (Tr. 2802-03)

The Georgia Supreme Court affirmed the death sentences notwithstanding its finding that the sentencing instructions improperly permitted the jury to consider the two murders as mutually supporting aggravating circumstances. See Wilson v. Georgia, 250 Ga. 630, 300 S.E.2d 640 (1983). The court held that at least one remaining statutory aggravating circumstance would suffice to support the death sentences. 250 Ga. at ____, 300 S.E.2d at ____. (See Appendix A)

All of the questions of sentencing presented in this case were necessarily reviewed by the Georgia Supreme Court under Ga. Code § 17-10-35(c)(1), which calls for a mandatory review

of "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor...." The Georgia court has interpreted this provision as requiring a broad consideration of the aggravating circumstances found by the jury and the evidence concerning the crime and the defendant. See Tucker v. Georgia, 244 Ga. 721, 261 S.E.2d 635 (1979). In addition, petitioner's counsel specifically objected at trial to the sentencing instructions that allowed the jury to consider the two murders as mutually aggravating. (Tr. 2638) The Georgia Supreme Court expressly considered and decided that question in its opinion. 250 Ga. at ____, 300 S.E.2d at ____. Also, at a pre-trial hearing on September 3, 1981 where the trial court heard defense objections to the discretion granted to the jury under the Georgia death-penalty scheme, counsel specifically relied upon the eighth and fourteenth amendments and Furman v. Georgia.

I.

THE GEORGIA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S DEATH SENTENCES IN ACCORDANCE WITH THE COURT'S PYRAMID INTERPRETATION OF GEORGIA'S CAPITAL SENTENCING SCHEME VIOLATES THE FUNDAMENTAL PRINCIPLES OF FURMAN V. GEORGIA AND STROMBERG V. CALIFORNIA WHERE THE JURY EXPRESSLY RELIED UPON AN INVALID AGGRAVATING CIRCUMSTANCE IN ITS DECISION TO IMPOSE THE DEATH SENTENCE.

The trial court erroneously authorized the jury to base a sentence of death upon an invalid aggravating circumstance. On review, the Georgia Supreme Court set aside the invalid aggravating circumstance but affirmed petitioner's death sentences. It held that "[s]ince at least one statutory aggravating circumstance remains to support each sentence of death, the elimination of one such circumstance does not require reversal of either sentence." 250 Ga. 630, 638, 300 S.E.2d 640, 648 (1983). As this Court has already recognized by granting certiorari in Stephens v. Zant, ____ U.S. ____, 102 S.Ct. 1856 (1982), the Georgia Supreme Court's routine affirmance of death sentences in

such cases raises serious questions as to the constitutionality and application of the Georgia death-penalty statute. Central principles of this Court's eighth amendment jurisprudence clearly require that petitioner be resentenced by a properly instructed jury.

A. The Georgia Supreme Court's articulation of the "state-law premises" that underlie Georgia's capital sentencing scheme renders that scheme inconsistent with the principles announced in Furman v. Georgia.

The Georgia Supreme Court, in response to a question certified to it by this Court in Stephens, ____ U.S. ____, 102 S.Ct. 1856 (1982), recently announced the state-law premises underlying Georgia's capital sentencing scheme. Zant v. Stephens, 250 Ga. 97, 99-100, 297 S.E.2d 1, 3-4 (1982). Even if petitioner's jury had been instructed in accordance with the Georgia Supreme Court's novel interpretation of the state death penalty statute, petitioner's death sentences must be vacated; the state court's pyramid sentencing scheme is inconsistent with the principles articulated in Furman v. Georgia, 408 U.S. 238 (1972).

In Gregg v. Georgia, 428 U.S. 153 (1976), this Court upheld the Georgia death penalty statute because the standards and procedures set forth therein promised to alleviate the concern of Furman that the death penalty not be imposed in an arbitrary or capricious manner. This Court relied heavily on the assumption that the statute's designation of specific aggravating circumstances would ensure that the jury be both "apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." 428 U.S. at 195 (Opinion of Justices Stewart, Powell, and Stevens). In short, a sentencing procedure setting forth specific aggravating circumstances would guide the jury's discretion in determining whether to impose the death penalty.

Nevertheless, this Court recognized that the constitutionality of Georgia's death sentences ultimately would depend on the state supreme court construing the statute and reviewing capital sentences consistently with the Furman requirements. The Georgia Supreme Court has failed to do so.

The Georgia Supreme Court's recent interpretation of Georgia's sentencing scheme assigned statutory aggravating circumstances a role fundamentally different from that perceived by this Court in Gregg. Zant, 250 Ga. at 99-100, 297 S.E.2d at 3-4. According to the Georgia Supreme Court, the state law governing homicide may be "envisioned as contained within a pyramid." Id. There are three "planes" of the pyramid between the base and the apex, with the consequences to the defendant increasing in severity as the cases proceed from the base to the apex. The first plane separates "from all homicide cases those which fall into the category of murder," and is "established by the Legislature in statutes defining such terms as murder, voluntary manslaughter, and justifiable homicide." Id. In determining whether a case falls above or below the plane, the trier of fact is limited to finding facts. Id.

The second plane "separates from all murder cases those in which the penalty of death is a possible punishment. This plane is established by statutory definitions of aggravating circumstances." Id. at 100, 297 S.E.2d at 4. The jury's function with respect to this plane is limited to finding at least one statutory aggravating circumstance. "A case may not pass the second plane into that area in which the death penalty is authorized [the third plane] unless at least one aggravating circumstance is found. However, this plane is passed regardless of the number of statutory aggravating circumstances found, so long as there is at least one." Id. Indeed, the jury, exercising absolute discretion, is free to impose a life sentence or a death sentence for any reason, or for no reason at all. Thus,

contrary to this Court's assumption in Gregg, whether a defendant lives or dies under the Georgia sentencing scheme is decided in accordance with the "virtually unthinkable" procedure of allowing the jury absolute discretion unguided and unchannelled by any legislative standards. See Gregg, 428 U.S. at 192-93.

The absence of legislative guidance at the life-or-death plane of the Georgia "pyramid" sentencing scheme is clearly inconsistent with the requirements of Furman. In essence, the "pyramid" sentencing scheme merely narrows the class of murder cases to which juries apply absolute discretion in determining the defendant's sentence. Whereas Georgia's pre-Furman capital sentencing scheme conferred absolute discretion on juries in all murder cases, the post-Furman "pyramid" scheme still confers such discretion although only in cases in which at least one statutory aggravating circumstance exists. This Court, however, has recognized that merely narrowing the class of cases in which the death penalty may be imposed does not alleviate federal constitutional concern about sentencing procedures. See Roberts v. Louisiana, 428 U.S. 325 (1976). Consequently, even assuming Wilson's jury adhered to the Georgia Supreme Court's ex-post facto interpretation of the Georgia sentencing scheme, the "pyramid" scheme provides "...standards so vague that they ... fail adequately to channel the sentencing patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found in Furman could occur." Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

In Gregg this Court also relied on "... the further safeguard of meaningful appellate review ... to ensure that death sentences are not imposed capriciously or in a freakish manner" in approving the Georgia sentencing scheme. 428 U.S. at 195; See id. at 222-24 (White, J., concurring). This Court concluded that "meaningful appellate review" was guaranteed by the requirement that the jury "specify the factors it relied upon in reach-

ing its decision,": to wit, the statutory aggravating circumstances that the jury found to exist. See id. at 195. The Georgia Supreme Court's incredible announcement that statutory aggravating circumstances play absolutely no role in the jury's sentencing determination, however, effectively destroys "meaningful appellate review" by that court. The Georgia Supreme Court's review of the jury's "third plane" decision consists solely of a perfunctory check to determine whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases. Because Wilson's jury did not "specify the factors it relied upon in reaching its decision," the Georgia Supreme Court could not know, and therefore did not review, the reasons for the imposition of the death penalty, if indeed there were any reasons. Id. Hence, appellate review under Georgia's "pyramid" sentencing scheme cannot guarantee that the death sentence will not be freakishly or capriciously imposed.

B. The Georgia Court's decision affirming petitioner's death sentences conflicts with the Fifth Circuit decision in Stephens v. Zant holding that a death sentence based partly on an invalid aggravating circumstance is unconstitutional under Stromberg v. California; this Court has granted certiorari in Stephens to resolve this substantial federal question.

The Georgia Supreme Court's affirmance of petitioner's death sentences on the ground that one valid aggravating circumstance remained is patently contrary to the well-settled principle that a court must not speculate whether a particular jury would have reached the same conclusion absent an unconstitutional instruction. See Stromberg v. California, 283 U.S. 359 (1931). If the jury is instructed to consider several grounds for conviction, one of which subsequently proves to be unconstitutional, and the reviewing court is unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside. Id. The court must

reverse a conviction if it "could have been based upon both [the unconstitutional] ... and [the constitutional ground] ... [because of the] unacceptable danger that the trier of fact will have regarded the two [grounds] ... as 'intertwined' and have rested the conviction on both together." Street v. New York, 394 U.S. 576, 587 (1969). This fundamental principle of due process applies with equal force to both the guilt-innocence phase and sentencing phase in all capital cases. Presnell v. Georgia, 439 U.S. 14, 16 (1978).

In Stephens v. Zant, on certification from the Supreme Court of the United States, the Georgia Supreme Court set forth the state-law premises underlying Georgia's capital sentencing scheme. Zant, 250 Ga. 97, 297 S.E.2d 1. The court explained that statutory aggravating circumstances simply play no role in the jury's final sentencing deliberations. Id. at 99-100, 297 S.E.2d at 3-4. Assuming arguendo that Georgia's novel interpretation of its capital sentencing scheme is constitutional, the trial judge in the instant case never informed the jury of the limited sentencing role of statutory aggravating circumstances. Accordingly, petitioner is "entitled to have the validity of [his sentence] ... appraised on consideration of the case as it was tried and as the issues were determined in the trial court." Cole v. Arkansas, 332 U.S. 196, 202 (1948); accord Presnell v. Georgia, 439 U.S. at 16.

The trial judge's charge to the jury repeatedly emphasized the importance of the statutory aggravating circumstances in the jury's sentencing deliberations. Indeed, the judge not only submitted the relevant aggravating circumstances to the jury in writing for use in its deliberations, but also required the jury to record each aggravating circumstance it found to exist beyond a reasonable doubt. The jury instructions provided absolutely no indication that, after carefully considering each statutory aggravating circumstance submitted by the trial judge, the jury

should, or even could, discard this list of officially sanctioned grounds for imposing the death penalty in deciding whether to actually sentence petitioner to death. The Fifth Circuit in Stephens held that such erroneous instructions create an unacceptable risk that a jury may rely upon an invalid ground during sentencing deliberations. Accordingly, the court vacated Stephen's death sentence and remanded the case for resentencing by a properly instructed jury. See 631 F.2d 397 (5th Cir. 1980).

Given that petitioner's jury may have attached great significance to the statutory aggravating circumstances in its sentencing deliberations, the jury may well have relied, at least in part, on the invalid aggravating circumstance in its decision to impose the death sentence. Moreover, because a death sentence is not mandatory under Georgia law upon the finding of a valid aggravating circumstance, [i]t is possible that even if the jurors believed that the other aggravating [circumstance was] established, they would not have recommended the death penalty but for" their partial reliance on the "invalid ground." Id. at 414.

II.

GEORGIA'S FAILURE TO OFFER THE JURY ANY GUIDANCE IN THEIR CONSIDERATION OF MITIGATING CIRCUMSTANCES RETURNS THE STATE TO THE ERA OF UNGUIDED DISCRETION THAT EXISTED BEFORE FURMAN V. GEORGIA.

The unbridled discretion accorded the jury in death-penalty cases also taints Georgia's approach to mitigating circumstances. This Court should grant certiorari on this issue for two reasons. First, the Georgia courts' narrow interpretation of their role in instructing the jury on mitigating circumstances raises a substantial issue regarding the precise scope of the trial court's duty in instructing the jury on the role and significance of mitigating circumstances in death-penalty cases. Second,

review is necessary to resolve a conflict between the Georgia Supreme Court and the federal courts of appeals.

A. This case poses substantial and novel issues regarding trial courts' duty to instruct and guide the jury in its use of mitigating circumstances.

In his jury instructions on sentencing, the trial judge limited his discussion of mitigating evidence to several reiterations of the following passage:

> In reaching that determination [of life or death] you shall consider all of the evidence, facts and circumstances of the case which have appeared at both the guilt-innocence phase and at the pre-sentence phase of the trial of this case, including any and all evidence in extenuation, mitigation, and aggravation of punishment.

(Tr. 2788-89) This charge contravenes the principles that this Court has articulated in decisions subsequent to Furman v. Georgia, 408 U.S. 238 (1972). These decisions suggest at least two constitutional prerequisites to the imposition of the death penalty. First, the court must provide the jury with sufficient guidance with which to render a reliable sentence. See Furman v. Georgia, 408 U.S. 238 (1972); Hertz & Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 Cal. L. Rev. 317 (1981). Godfrey v. Georgia, 446 U.S. 420 (1980), most clearly articulates this requirement. In Godfrey, the Court held that the Georgia Supreme Court's interpretation of one of its statutory aggravating circumstances was so vague that the jury lacked meaningful guidance. Id. at 433.

Second, the sentencing authority must be able to consider all relevant evidence in mitigation. Thus, in Woodson v. North Carolina, 428 U.S. 280 (1976), and Lockett v. Ohio, 438 U.S. 586 (1978), the Court struck down state laws that required imposition of the death penalty under specified circumstances and limited

consideration of mitigating circumstances. The Lockett plurality noted that the eighth and fourteenth amendments require that the sentencing authority "not be precluded from considering, as a mitigating factor, any aspect of defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604 (emphasis in original); see also Eddings v. Oklahoma, 455 U.S. 104 (1982); Bell v. Ohio, 438 U.S. 632 (1978).

A state's application of the death penalty, then, must tread a fine line to pass constitutional muster. See Lockett v. Ohio, 438 U.S. at 628-29 (Rehnquist, J., dissenting). Although a trial court must guide the jury's exercise of discretion, it cannot restrict the jury's consideration of the evidence. Statutes ensuring that "the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information," Gregg v. Georgia, 428 U.S. at 195, meet this standard. See, e.g., id. at 153; Profitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

In Georgia capital cases, the "jury is authorized to consider any ... appropriate aggravating or mitigating circumstance." Gregg, 428 U.S. at 197; see Ga. Code Ann. § 17-10-30 (1982). For this reason, this court found that Georgia's sentencing scheme was constitutional on its face. Yet Georgia's practice of perfunctorily mentioning the existence of mitigating evidence, rather than explaining its role and guiding the jury, renders the statute unconstitutional, in violation of "the defendant's procedural right to the jury instructions necessary to give effect to the substantive Lockett requirements." Hertz & Weisberg, supra, at 314.

The validity of Georgia's limited reading of this Court's recent decisions ultimately depends on whether the instructions given would inform a reasonable juror of the law's requirements.

Sandstrom v. Montana, 442 U.S. 510 (1979). The need for special assurances of reliability in death-penalty cases[1] casts doubt on whether Georgia's superficial instructions meet this standard and apprise a juror of his ability to consider mitigating evidence.[2] Merely admitting evidence in mitigation is constitutionally insufficient; such evidence is of slight value unless the jury understands the role and significance that such evidence may play. See Taylor v. Kentucky, 436 U.S. 478, 488-89 (1978). The jury must be told, in other words, more than merely to consider mitigating circumstances; the role of such evidence must be explained in some fashion. Absent sufficient guidance, the guarantees of Gregg and Lockett ring hollow.

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[1]Consequently, petitioner would not extend his argument beyond sentencing instructions in death-penalty cases. As this Court has often observed the death penalty invokes concerns that are qualitatively different from those in more conventional criminal cases:

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. at 395.

[2]Thus petitioner recognizes that this case does not fit squarely within the confines of Lockett v. Ohio, 428 U.S. 586 (1978). In Lockett, Ohio's statutory sentencing scheme actually barred admission of certain mitigating evidence. This case invites a logical extension of the sound principles articulated in Lockett. Cf. Spivey v. Zant, 661 F.2d 464, 470 (5th Cir. 1981), cert. denied, 102 S.Ct. 3495 (1982) (while Lockett inapplicable, court extends its principles "to require clear instructions on mitigation and the option to recommend against death").

B. Conflict on this issue between the Georgia Supreme Court and the United States Courts of Appeals for the Fifth and Eleventh Circuits fosters uncertainty and duplication.

The Georgia Supreme Court has narrowly interpreted the requirement of instructing the jury on "mitigating circumstances." In Spivey v. State, 241 Ga. 477, 246 S.E.2d 288, cert. denied, 439 U.S. 1039 (1980), the trial judge told the jury at sentencing that it was authorized to consider all evidence heard in both the guilt-innocence and sentencing phases of the trial in determining an appropriate penalty. In his instructions, the trial judge failed to mention the words "mitigating circumstances." The Georgia Supreme Court held the charge constitutionally adequate. 421 Ga. at 479, 246 S.E.2d at 291. The court reasoned that because the Georgia statute, Ga. Code Ann. § 17-10-30 (1982), did not define "mitigating circumstances" the jury could consider anything as mitigating "without limitation or definition." 421 Ga. at 479, 246 S.E.2d at 291. Thus, according to the Georgia court in Spivey, a trial court need not mention, define, or explain mitigating circumstances to the jury, or guide its use of this evidence.

In Smith v. State, 249 Ga. 228, 290 S.E.2d 43, cert. denied, ____ U.S. ____, 103 S.Ct. 182 (1982), the court held without discussing Spivey that the trial court's failure to define the term "mitigating" was constitutionally adequate. The court concluded that "[m]itigation is a word of common meaning and understanding, it is not error to fail to define it." Id. at 299, 290 S.E.2d at 45.

In effect, the Georgia Supreme Court has endorsed its lower courts' policy of providing no guidance to the jury. The Georgia trial courts fail to both "[t]ell the jury what a mitigating circumstance is" and "what its [evidence in mitigation] function is in the jury's sentencing deliberations." Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. 1982).

The Courts of Appeals for the Fifth and Eleventh Circuits have opted for an approach drastically at odds with that of the Georgia Supreme Court, fostering a cycle in which the state Supreme Court summarily affirms the sentence and the federal courts then vacate on writ of habeus corpus. In Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978), the court vacated a Georgia death sentence because the

> constitutional requirement to allow consideration of mitigating circumstances would have no importance, of course, if the sentencing jury is unaware of what it may consider in reaching its decision. We read Lockett and Bell, then, to mandate that the judge clearly instruct the jury about mitigating circumstances and the option to recommend against death.

The Fifth and Eleventh Circuits have reaffirmed the Chenault duty on numerous occasions. See, e.g., Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (Florida); Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982) (Texas); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982) (Georgia); Georgia v. Watkins, 681 F.2d 1067 (5th Cir. 1982) (Georgia); Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981) (Georgia), cert. denied, ____ U.S. ____, 103 S.Ct. 182 (1982); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981) (Texas); cf. id. at 1375 (emphasis added) ("The fatal flaw in Lockett was not the exclusion of evidence relating to non-statutory mitigating factors, but the limitation on the sentencer's consideration of the evidence.")

Recent decisions highlight the need to resolve this conflict. After the Georgia Supreme Court affirmed in Spivey, 241 Ga. 477, 246 S.E.2d 288, cert. denied, 439 U.S. 1039 (1980), the Court of Appeals for the Fifth Circuit later vacated the sentence. See Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981). Although the court of appeals made clear its intent to vacate any sentence lacking adequate instructions on mitigation, the Georgia state courts have failed to heed this warning, promoting uncertainty and unnecessary litigation. Recently, the Eleventh

Circuit considered an instruction similar to the one in this case. In Goodwin v. Balkcom, the jury was told to consider "all the facts and circumstances" and any "evidence in extenuation, mitigation, or aggravation." 684 F.2d at 799. In vacating the sentence, the court concluded:

> In this circuit, then, the state of the law is well settled. Capital sentencing instructions which do not clearly guide a jury in its understanding of mitigating circumstances and their purpose . . . violate the eighth and fourteenth amendments.

Id. at 802.

As in Goodwin, the court of appeals is likely to vacate the sentences in this case on writ of habeus corpus. Only this Court's exercise of its power of review can prevent the disharmony and protracted litigation that this conflict has engendered.

C. Georgia's courts' interpretation of its sentencing scheme is inconsistent with the approach taken by 33 of 35 states.

Georgia's approach of offering the jury no guidance on mitigating circumstances is nearly universally repudiated by other states.[3] Of the 35 states with death-penalty statutes, the most common approach provides the sentencing jury with a non-exclusive list of mitigating circumstances.[4] Another approach, one specifically mentioned in Gregg v. Georgia, 428 U.S. at 193, offers the sentencing jury a non-exclusive list of mitigating

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[3]Only South Dakota and Georgia neither provide a non-exclusive list of mitigating circumstances nor explain to the jury the functions of mitigating circumstances. Ga. Code Ann. § 17-10-30 (1982); S.D. Codified Laws Ann. § 23A-27A-1 (Supp. 1982) Three states--Oklahoma, Delaware, Idaho--provide for weighing but do not offer a non-exclusive list of mitigating circumstances. See Del. Code Ann. 11 :4209 (1979 Repl. vd.); Idaho Code 19-2515 (1979); Okla. Stat. Ann. 21-701.11 (West 1982).

[4]Twenty-eight states have adopted this approach. See Appendix E.

circumstances and directs the jury to weigh aggravating and mitigating circumstances against each other.[5] See Model Penal Code § 201.6 comment 3 (Tent. Draft No. 9 1959). As nearly every other state with a death-penalty statute has recognized, some such guidance to the jury is necessary to ensure reliable sentences.

III.

THE GROSS MISCONDUCT OF PETITIONER'S TRIAL COUNSEL, IN EFFECT PLEADING HIS CLIENT GUILTY DURING CLOSING ARGUMENTS (NOTWITHSTANDING PETITIONER'S TRIAL TESTIMONY WHICH, IF BELIEVED, WOULD HAVE REQUIRED CONVICTION FOR NONCAPITAL OFFENSES, AND NOTWITHSTANDING INSTRUCTIONS TO THE JURY BY THE TRIAL COURT, BASED ON PETITIONER'S TESTIMONY, AUTHORIZING FINDINGS OF VOLUNTARY MANSLAUGHTER AND SELF-DEFENSE) CONSTITUTES A PLAIN ERROR THAT RENDERS PETITIONER'S TRIAL AS A WHOLE FUNDAMENTALLY UNFAIR.

On the day of his arrest, petitioner gave a taped statement to police officers in which he admitted firing his handgun two times, but insisted that he lacked any intent to injure. Petitioner plead not guilty to two counts of murder and one count of armed robbery at his arraignment. At trial, petitioner gave testimony consistent with his pretrial statement; he admitted firing his gun at two men, but denied having intent to kill or to inflict great bodily injury. Instead, petitioner reiterated that he feared for his own safety and fired the shots to protect himself. Despite his client's repeated assertion that he lacked intent to kill or injure, and despite jury charges on the lesser offenses of voluntary manslaughter and self-defense, petitioner's trial counsel instructed the jurors during his closing argument that if they accepted their responsibility as jurors, they should find petitioner guilty of both counts of murder and not guilty of armed robbery.

This concession was consistent with comments made by counsel

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[5]Thirteen states have adopted this approach. See Appendix E.

during voir dire and his opening statement. During voir dire, counsel referred to the victims as people murdered by the defendant. Similarly, during his opening statement counsel referred to the victims as men defendant had killed. The jury returned a verdict of guilty on each charge after less than two hours of deliberation.

Under this Court's Rule 34(1)(a), "the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide." Although the Georgia Supreme Court did not explicitly consider whether petitioner's trial counsel rendered effective assistance,[6] under Rule 34(1)(a), this Court may review the record independently and take notice of the patently ineffective assistance rendered by petitioner's counsel. See Vachon v. New Hampshire, 414 U.S. 478 (1974) (Where this Court conducted an independent examination of the trial record and determined that there was a complete absence of evidence as to a crucial element of the offense charged. The due process claim sustained by the Court had not been raised on appeal in the state supreme court.) The ineffective assistance plainly revealed by the trial record in this case constitutes the type of fundamental constitutional

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[6] Under the Georgia Unified Appeal Procedure, the trial judge in a capital case is required to transmit a report in the form of a questionnaire to the Supreme Court along with the entire transcript of all proceedings below within thirty days from entry of an order denying a motion for a new trial. Ga. Code § 27-2537 (1983). Included in this report from the trial court is a summary of defense counsel's prior experience and the trial judge's notation of the defendant's response when asked whether representation of counsel has been satisfactory. Thus, the Georgia Supreme Court must implicitly take notice of whether trial counsel has performed adequately when it reviews the entire record on appeal. This is a case where the state court could not have reached its judgment without tacitly, if not expressly, deciding this federal issue of effective assistance of counsel. Therefore, this Court could take jurisdiction on this issue solely on the basis of 28 U.S.C. § 1257 without resort to Rule 34(1)(a). See Schlemmer v. Buffalo, Rochester & Pittsburgh Railway Co., 220 U.S. 590 (1911).

error that the Court should not ignore.[7] Cf. Mahler v. Elby, 264 U.S. 134, 145 (1924) ("We may under our rules notice a plain and serious error though unassigned. The character of the defect is such that we cannot relieve ourselves from its consideration.") Considerations of judicial economy also support review of this issue on petition for certiorari. No conceivable explanation could be revealed in a hearing on a habeus corpus petition that would vindicate the decision of petitioner's counsel plainly revealed by the record to concede his client's guilt during summation.

Petitioner's version of the events of June 22, 1981, in both his pre-trial statement and his trial testimony, suggested at least one possible defense to the two counts of malice murder with which he was charged under Georgia law. The defense of voluntary manslaughter was consistent with petitioner's version of the killings. Under Georgia law, a killing that would otherwise be murder justifies only a verdict of voluntary manslaughter if the perpetrator acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person.

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[7] There are an extraordinary number of other instances of ineffective assistance of counsel in this case. During pre-trial proceedings, counsel utterly failed to substantiate a motion for change of venue based on publicity when such evidence was apparently readily available. During the sentencing phase of the trial, counsel's examination of witnesses offering mitigating evidence was painfully inept. The Georgia Supreme Court was required to remind counsel several times that an appellate brief was due and finally warned counsel of possible sanctions it would impose for failure to file the brief. That brief when eventually filed listed but utterly failed to address in any fashion several grounds of error. More significantly, rather than even perfunctorily analyzing the issues, the brief appears to merely copy verbatim substantial portions of counsel's oral argument transcribed in the trial record. Despite this abundance of evidence reflecting the ineffective assistance of counsel, this Petition deals only with one aspect of counsel's performance at trial. Counsel's assistance at trial by itself was so patently deficient as to constitute a violation of due process plainly visible from the record.

Despite the availability of this partial defense to the malice murder charges (along with the complete defense of self-defense), petitioner's plea of not guilty to all charges against him, and a jury instruction given by the trial judge on voluntary manslaughter and self-defense, petitioner's trial counsel told the jury during his summation to find petitioner guilty of both counts of murder and to acquit him of one count of armed robbery.

In effect, petitioner's trial counsel entered a guilty plea on behalf of his client without his client's consent. This deprived petitioner of his due process right to a fair trial and his sixth amendment rights to the effective assistance of counsel and to a trial by jury. In Brookhart v. Janis, 384 U.S. 1 (1966), trial counsel agreed to let his client's guilt be established in a prima facie trial devoid of cross-examination even though the defendant had never plead guilty. This Court held that although under ordinary circumstances counsel can preclude the accused from asserting certain constitutional claims as a matter of trial strategy, there is no support for the "contention that counsel for defendant can override his client's desire expressed in open court to plead not guilty and enter in the name of his client another plea . . . which would shut off the defendant's constitutional right to confront and cross-examine the witnesses against him." Id. at 7-8. Undeniably, after Henry v. Mississippi, 379 U.S. 443 (1965), counsel may make some strategic decisions that involve waiver of constitutional rights without consulting the accused. The right to plead not guilty, however, is not among the constitutional rights that may be waived without consultation. "Where an inherently personal right of fundamental importance is involved," the waiver must be made personally by the accused to be considered effective. Winters v. Cook, 489 F.2d 174, 189 (5th Cir. 1973). Such personal fundamental rights include the right to plead guilty, the right to waive a trial by jury, the

right to waive appellate review, and the right to testify personally. Id. at 179.

The American Bar Association Standards for the Defense Function also recognize that the accused is solely responsible for determining his plea. Section 4-5.2(a) provides: "Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: 1) what plea to enter, 2) whether to waive jury trial, and 3) whether to testify in his own behalf." ABA, Standards for Criminal Justice § 4-5.2 (2d ed. 1980). Petitioner's counsel wrested the first two of these decisions from his client and then plead him guilty to the jury despite his earlier plea of not guilty at arraignment. The ABA also provides standards to guide lawyers handling pleas of guilty: "Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant." ABA, Standards for Criminal Justice, supra, § 14-3.2(a). In this case, counsel's position was fundamentally at odds with petitioner's in-court testimony, his out-of-court statement, and his plea of not guilty at the arraignment.

In Hudson v. Alabama, 493 F.2d 171 (5th Cir. 1974), following the defendant's plea of not guilty at his arraignment, his trial counsel read the jury a sentencing agreement previously arranged with the state solicitor. The jury left the courtroom without listening to any evidence and returned shortly thereafter with a guilty verdict recommending that the sentence set forth in the agreement be imposed. The Fifth Circuit held that such assistance as that rendered by defendant's counsel clearly was not reasonably effective. Id. at 173.

Under any reasonable standard of effective assistance

guaranteed by the sixth amendment, the assistance rendered by petitioner's trial counsel was ineffective. Moreover, this ineffective assistance severely prejudiced petitioner. Counsel's error was more severe than the unnecessary elicitation of an inflammatory statement, Adams v. Balkcom, 688 F.2d 734, 745 (11th Cir. 1982), more prejudicial than a decision whether to question witnesses, United States v. Hughes, 635 F.2d 449, 452 (5th Cir. 1981), and more prejudicial than a failure to object to improper jury argument by the prosecutor. Fulford v. Maggio, 692 F.2d 354 (5th Cir. 1982). In short, the action of petitioner's trial counsel cannot be excused as a valid trial tactic. Even if the concession of petitioner's guilt made by counsel to the jury is considered a defense strategy, it was so ill-chosen that it rendered counsel's overall representation constitutionally defective. Adams v. Balkcom, 688 F.2d at 738; see also Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied 456 U.S. 949 (1982). A guilty verdict was inevitable following defense counsel's closing argument; no greater prejudice may result from an error by trial counsel. Thus, the assistance petitioner received was in clear derogation of his constitutional right to a fair trial in which he receives adequate representation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Nelson E. Roth, Esq.
The Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853
(607) 256-3408

May 26, 1983

82-6852

Office-Supreme Court, U.S.
FILED
MAY 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIE JAMES WILSON,

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, by and through his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to Supreme Court of the State of Georgia without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 46 of the Rules of this Court.

Petitioner's Affidavit in support of this motion is attached hereto as "Exhibit A."

Respectfully submitted,

Nelson E. Roth
The Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853

ATTORNEY([redacted]) FOR PETITIONER

RETAINER OF COUNSEL AGREEMENT

I, WILLIE JAMES WILSON, hereby retain Nelson Roth, a member of the Bar of the State of New York and a member of the faculty of the Cornell Law School in Ithaca, New York, to represent me in the filing of a Petition for Writ of Certiorari in the Supreme Court of the United States, and in any other legal proceedings, if necessary, relating to the sentence of death imposed upon me in 1982, in the Superior Court of Pierce County, Georgia, for the crime of murder. I give him permission to associate with himself in this effort such other attorneys as he in his best judgment sees fit.

It is understood between me and Nelson Roth that the services which he and any other associated counsel render are free and without charge.

Willie James Wilson Jr.

WILLIE JAMES WILSON
EF-143520
G. D. and C. C.
P. O. Box 3877
Jackson, Georgia 30233

STATE OF GEORGIA
COUNTY OF BUTTS

The aforesaid Agreement of WILLIE JAMES WILSON was subscribed to and sworn to before me, this the 29 day of March, 1983.

Aaron Mcgowan

Notary Public

My Commission expires:

9-20-83

No. 82-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIE JAMES WILSON,

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

I, WILLIE JAMES WILSON, declare that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to relief.

1. Are your presently employed? Yes____ No ✓

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

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   b. If the answer is "no," state the date of last employment and the amount of salary and wages per month which you received.

   last employment U.S. Army, last date of employment was 1981, salary per month $591. Box 2/11 Zip Code Ft. Stewart Ga. 31314

2. Have you received within the last twelve months any money from any of the following sources?

a. Business, profession or form of self-employment? Yes___ No✓
b. Rent payments, interest or dividends? Yes___ No✓
c. Pensions, annuities or life insurance payments? Yes___ No✓
d. Gifts or inheritances? Yes___ No✓
e. Any other sources? Yes___ No✓

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. _____

3. Do you own cash, or do you have money in checking or savings account?

Yes ___ No ✓ (Include any funds in prison accounts.) If the answer is "yes," state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ___ No ✓
If the answer if "yes," describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Willie James Wilson

WILLIE JAMES WILSON

STATE OF GEORGIA
COUNTY OF BUTTS

WILLIE JAMES WILSON, being first duly sworn under oath, presents that he had read and subscribed to the above and states that the information therein is true and correct.

Subscribed to and sworn to before me,
this the 21 day of March, 1983.

Notary Public

My Commission expires:
4-10-83

CERTIFICATE

I hereby certify that the petitioner herein, _____, has the sum of $ _____ on account to his credit at the Georgia Diagnostic and Classification Center where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said Georgia Diagnostic and Classification Center: _____

_____

_____

_____

_____

Authorized Officer of Institution

82-6852

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIE JAMES WILSON, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF GEORGIA

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In the Supreme Court of Georgia Decided: MAR - 1 1983

38880. WILSON v. THE STATE.

CLARKE, Justice.

Appellant, Willie James Wilson, Jr., was convicted in Pierce County of armed robbery and two counts of murder. He was sentenced to death for each of the murders and to life imprisonment for the armed robbery. His trial was conducted under the Georgia Unified Appeal Procedure. After careful review, we affirm.

The two victims, Alfred Boatright and Morris Highsmith, were shot at approximately 4:00 p.m. on June 22, 1981, while they were working at Boatright's handy stop near Bristol, Georgia. Ninety dollars was taken from the store. Appellant was arrested later in Hinesville.

In a statement given after his arrest, and in his testimony at trial, appellant admitted that he shot Boatright and Highsmith and took $90 from the store. He contended, however, that the shootings were the result of a misunderstanding and that the theft of the cash was an afterthought.

Appellant had been a soldier stationed at Fort Stewart, near Hinesville. In the middle of June, 1981, he left the base, without permission, so that he could,

in his words, "clear up my head . . . [and] . . . get myself together." He spent several days with friends in Blackshear. By June 22, appellant's money was almost gone. He and Darris Miller drove to Hoboken, where appellant filled out two employment applications.

Miller testified that while they were in Hoboken, appellant suggested they "hit" a place, but was dissuaded from doing so by Miller, who told him the Hoboken police were too bad. Miller testified that they went from Hoboken to Waycross, gassed up, and drove west from Waycross, still looking for a place to rob. Appellant pulled a pistol from under the car seat and Miller put two shells in it. Then, according to Miller, appellant "said if he was to ever hit a place, he don't leave no witnesses . . ."

Appellant, testifying in his own behalf, denied that he and Miller had talked about robbing anyone. He testified that when they returned to Blackshear, he dropped Miller off and "went riding," trying to make up his mind whether or not to return to Fort Stewart. His wandering took him to Bristol. He bought a pack of cigarettes at Boatright's and left, but stopped a short distance up the road because he noticed his car was running hot. Upon also discovering that he was nearly out of gas, he returned to Boatright's.

At this point, although appellant admittedly knew that he had less than $15 left and that it would require at least $20 worth of gasoline to fill his tank, appellant instructed Morris Highsmith to fill it up. Afterwards, the two entered the store. Boatright, according to appellant, was standing to the left of the door, behind the counter near the cash register. Highsmith

walked toward the end of the counter. Appellant testified that when he told Boatright he didn't have enough money to pay for the gas, he and Boatright "started exchanging profanity words." Appellant pulled his pistol out of his pocket, intending to pawn it for the gas. Before he could fully explain the situation, however, appellant saw Highsmith bending down behind the counter, got scared, and shot both Highsmith and Boatright. After the "accident" happened, appellant took the cash he saw on the counter near the cash register and fled.

Boatright lived long enough to call for help. When law enforcement officers arrived, Boatright was still alive, sitting in a black chair behind the counter with the telephone in his lap. Blood was observed on the floor between that chair and a brown chair in the rear of the store near the beer cooler. The brown chair also had blood on it. Highsmith was lying face down on the floor in the rear of the store with an overturned folding chair lying across his legs. No weapons were found in the store.

Highsmith died from a gunshot wound which entered his left shoulder and penetrated his spinal canal. In the opinion of Dr. Byron Dawson, who conducted the autopsy, this wound caused instant paralysis of all muscles below the level of the wound and immediate loss of control of heartbeat and breathing.

Boatright suffered a gunshot wound in his right side which caused internal hemorrhaging and, within an hour, his death.

The state, while accepting appellant's admission that he and not some other person shot Boatright and

Highsmith,[1] disputes much of the remainder of appellant's testimony.

For instance, the state points out that had the two victims been standing behind the counter in the positions described by appellant, Boatright would have been to appellant's left and Highsmith to his right. It is therefore unlikely, the state contends, that appellant could have shot Boatright in his right side and Highsmith in his left side. Moreover, there was a television set on the counter which, in appellant's scenario, would have been between him and Highsmith. Finally, given the instant paralysis that Highsmith's wound caused, his body should have been discovered behind the counter, and not in the middle of the floor in the rear of the store with a folding chair lying across his legs.

The state, noting the beer cooler door was open when law enforcement officers arrived, theorizes that appellant, upon entering the store, walked to the beer cooler and opened the door. Then, while Highsmith sat in the wooden folding chair and Boatright sat in the brown upholstered chair, with their backs to the beer cooler, appellant shot both of them, ran to the cash register, took the cash and fled. Highsmith, upon being shot, immediately fell to the floor, his chair

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[1] This admission is corroborated by other evidence, including, but not limited to, ballistics evidence; the testimony of Sue Nell Boatright, who identified appellant as the person driving a yellow car who entered the store just as she was leaving at approximately 4:00 p.m.; and the testimony of Parnell Sapp, who identified appellant's yellow Grand Prix as the car parked by the side of the road north of Boatright's, who saw the same car a few minutes later at Boatright's, and who heard sirens 10-15 minutes after that.

falling across his legs. Boatright walked to the telephone behind the counter, leaving a trail of blood from the brown chair to the telephone.

1. While these theories of the state are conclusions, they can be logically inferred from the evidence. We find the evidence sufficient to support appellant's convictions for malice murder. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979). Appellant contends, however, that his armed robbery conviction may not stand, for two reasons.

First, appellant contends that since armed robbery is a lesser included offense of felony murder, where the underlying felony is armed robbery, he cannot be convicted of both. See Odom v. State, 248 Ga. 434 (1) (283 SE2d 885) (1981). Appellant, however, was indicted for malice murder and the trial court charged malice murder. The trial court did not charge felony murder. It follows, then, that appellant was convicted of malice murder and that the armed robbery was not an included offense of either murder. Ruffin v. State, 243 Ga. 95 (11) (252 SE2d 472) (1979).

Second, appellant argues that the armed robbery conviction may not stand because the indictment alleged that the money taken by him was the property of Alfred Boatright, when the evidence showed that it was the property of his daughter, Sue Nell Boatright.

The evidence showed that Alfred Boatright had formerly owned the business but had, in 1979, leased it to Sue Nell. In her absence, Alfred worked at the store and had custody and control of the store and the money in it.

In an armed robbery case, the state must allege and prove that the defendant took property of a person or persons other than the accused. OCGA §§ 16-8-41; 16-1-3(3); McKisic v. State, 231 Ga. 644 (2) (203 SE2d 533) (1977). However, "ownership of the property taken may be laid in the person having actual lawful possession of it, although he may be holding it merely as the agent of another, and it is not necessary to set forth in the indictment the fact that the person in whom the ownership is laid is holding it merely as agent of the real owner." Spurlin v. State, 222 Ga. 179, 182 (7) (149 SE2d 315) (1966).[2] See also, Cline v. State, 153 Ga. App. 576 (3) (266 SE2d 266) (1980).

In any case, there must be a sufficient correspondence between the allegations and the proof: "(1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." DePalma v. State, 225 Ga. 465, 469-470 (3) (169 SE2d 801) (1969) (cites omitted). See also Bell v. State, 227 Ga. 800 (1) (183 SE2d 357) (1971). We find that appellant was not subjected to either of these dangers and that the

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[2] Spurlin was decided before the 1968 Revision to the Criminal Code. However, in the committee notes to Chapter 26-20 of former Ga. Code Ann. (Harrison 1977), (which were to be considered "an expression of the legislative intent"), it was stated: "The new law [of robbery] substantially conforms to the former Code provisions, though the form is different." That portion of the definition of armed robbery pertinent here has been carried down unchanged since 1968. Compare Ga. L. 1968, p. 1298 with OCGA § 16-8-41.

evidence authorized the armed robbery conviction. Jackson v. Virginia, supra.

2. Appellant's first five enumerations of error allege error in the denial of funds and expert assistance.

(a) Appellant filed a motion for funds to employ a private psychiatrist to examine appellant. At the hearing on the motion, appellant testified that nothing had occurred in his past that had required a mental evaluation, that he had not filed a plea of insanity, and that he did not consider himself to be insane. No evidence was presented which contradicted appellant's testimony, and appellant did not attempt to raise a defense of insanity at trial.

The trial court denied appellant's request for an independent evaluation, but offered an examination by state psychiatrists. This offer was refused.

"The grant or denial of a motion for independent psychiatric examination lies within the discretion of the trial court and will not be overturned unless an abuse of discretion is shown. [cits] We find no abuse of discretion in denying an independent psychiatric examination in this case." Messer v. State, 247 Ga. 316 (1) (276 SE2d 15) (1981).

(b) Appellant was arrested June 30, 1981. He was indicted the next day and on July 2, M. C. Pritchard was appointed to represent him. Thereafter, appellant filed a motion for additional legal assistance and funds to hire an investigator. On August 24, 1981, the trial court appointed John Thigpen to assist Mr. Pritchard, but denied appellant's request for an investigator. Appellant's trial began in the latter part of January, 1982.

Appellant had the assistance of two attorneys for five months prior to his trial. The court did not abuse its discretion by failing to provide additional funds for an investigator.

(c) Appellant, in three separate motions, sought funds to pay for the services of experts to conduct a community opinion survey, to be used in his motion for change of venue; to investigate and compute discrepancies between the population of Pierce County and its grand and traverse jury pools, in preparation for his jury challenges; and to conduct a statewide survey to be used to determine whether the death penalty is arbitrarily enforced in Georgia. These motions were denied.

This court has consistently held that the grant or denial of a motion for appointment of expert witnesses for an indigent defendant lies within the sound discretion of the trial court and, absent an abuse of discretion, the court's ruling will be upheld. See, e.g., High v. State, 247 Ga. 289 (2) (276 SE2d 5) (1981). We find no abuse of discretion here, and if, in an appropriate case, due process and fundamental fairness might require the state to provide expert assistance to an indigent defendant, this is not such a case. See, Hoback v. Alabama, 607 F2d 680, 682 (5th Cir. 1979).

3. In his sixth and seventh enumerations of error, appellant contends that the court erred in overruling his grand and traverse jury challenges.

Pierce County, according to the 1970 census, is 48.8% male, 51.2% female, 18.1% black, and 81.9% white.[3]

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[3] The jury lists were drawn up before 1980 census figures were available. At the time of the hearing, preliminary 1980 census figures broken down by race, but not by sex, indicated that the percentage of blacks had decreased to 14% of the total population of Pierce County.

The grand jury which indicted appellant was drawn from a list that was 51.3% male, 48.7% female, 13.7% black, and 86.3% white. The traverse jury which convicted appellant was drawn from a list that was 48.2% male, 51.8% female, 14% black, and 86% white.[4]

(a) "Criminal defendants in state courts may challenge discriminatory selections of grand and petit juries through the equal protection clause of the Fourteenth Amendment. [cits]" United States v. Perez-Hernandez, 672 F2d 1380 (11 Cit. 1982). Moreover, criminal defendants in state courts have the right to challenge, under the Sixth Amendment, petit juries not selected from a fair cross section of the community. Duren v. Missouri, 439 U. S. 357 (99 SC 664, 58 LE2d 579) (1979). The two challenges are not entirely analagous. Id, at 439 U. S. 368, n. 26. See also, Walraven v. State, 250 Ga. 401 (3) (297 SE2d 278) (1982). However, common to each is the requirement that the defendant must establish prima facie that a distinct and identifiable group in the community is substantially underrepresented on the jury venire being challenged. The percentages established by appellant fail to show such substantial underrepresentation, and the trial court properly overruled appellant's jury challenges. See Machetti v. Linahan, 679 F2d 236 (11th Cir. 1982) and cases cited therein at p. 241.

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[4] These figures may be more readily visualized in chart form:

	Population (1970)	Grand Jury List	Traverse Jury List
Males	48.8	51.3	48.2
Females	51.2	48.7	51.8
Blacks	18.1	13.7	14
Whites	81.9	86.3	86

(b) The jury commission, at the time of the hearing, was composed of four white males, one black male and one white female, all of whom were over 40. Appellant contends the jury commission was unrepresentative of the population of Pierce County. This contention provides no basis for reversal. Cf. White v. State, 230 Ga. 327, 332 (2) (196 SE2d 849) (1973).

4. In enumerations of error thirteen through twenty-four, appellant contends that his challenges to eleven prospective jurors should have been granted.

(a) Two of the prospective jurors were challenged because they were reserve police officers. Charles Foreman was once a part-time police officer with the City of Blackshear. At the time of the trial, he was a member of the inactive reserves, which meant that, should extra help be needed, he might be called. He did not have a uniform, however, and had done no work in connection with this case. Larry Walker was an auxiliary policeman with the Blackshear police department. He stated that he had never done any criminal investigation on behalf of the Blackshear police department and only helped the police department with ball games.

Hutcheson v. State, 246 Ga. 13 (1) (268 SE2d 643) (1980), which held that police officers, employed full-time, must be excused if challenged for cause in criminal cases, is inapplicable to this case. Since Walker and Foreman stated that their limited connections with the Blackshear police department would not influence their deliberations and they could be impartial and fair to both sides, the trial court did not err in overruling appellant's challenges for favor. See Jordan v. State, 247 Ga. 328 (6) (276 SE2d 224) (1981).

(b) The other nine prospective jurors were challenged because they knew one or more of the victims or their families.

Juror Ann C. Wall was probably best acquainted with at least one of the victims. She had worked in the local ASCS office for years and through her work had come into contact with Alfred Boatright. Although she never socialized with him, she had "known him for years as a friend." She conceded to defense counsel that as a result of her friendship with Boatright she might favor his side a "little bit." However, she stated she thought she could be fair and impartial and would consider only the evidence presented in the case. She stated she had no opinion regarding appellant's guilt or innocence.

Most of the rest of the challenged jurors knew one or the other of the victims only casually. None of them had an opinion as to appellant's guilt or innocence, nor did any express a bias or prejudice against appellant. "On this record we cannot find that the trial judge erred in overruling the challenges for favor. [cites]" Jordan v. State, Id. at 340.[5]

5. In his eighth enumeration of error, appellant contends the trial court erred in denying his motion for change of venue. We find no error. Of the 64 jurors who were examined, only 4 were excused for bias or prejudice resulting from pre-trial publicity.[6] None of the

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[5] Of the eleven jurors challenged, only one sat on his jury. We note that appellant used only 19 of his 20 peremptory strikes.

[6] Two other jurors were excused because of bias or prejudice resulting from friendship with the victims or their families. Three jurors were excused for conscientious objection to the death penalty. Other jurors, not all of whom underwent voir dire, were excused for health reasons or because of kinship within a prohibited degree.

jurors put upon appellant expressed any opinion as to his guilt or innocence. The low number of veniremen excused corroborates the absence of such prejudicial publicity as would require the grant of a motion for change of venue. Messer v. State, supra.

6. In his twelfth enumeration of error, appellant contends that because his character was placed in issue during the jury voir dire, the entire jury panel should have been dismissed and a new venire obtained.

When the court asked the fourth juror on the panel the statutory question--"Have you any bias or prejudice resting on your mind either for or against the accused?"--The juror responded that he did because he was a retired military man and he had read that appellant had been AWOL at the time of the alleged offense. The juror was excused, but the trial court refused to disqualify the rest of the jurors, most of whom had heard the answer. Instead, the trial court instructed the other jurors to disregard unresponsive answers by fellow prospective jurors. Additionally, during the remainder of the voir dire, the court asked each juror if the juror had heard the remark of the fourth juror and, if so, had the remark affected the juror's impartiality in any way. Only one juror indicated a bias concerning the answer and he stated that he had already read the same thing and was already biased before he heard the remark. This juror was excused.

In view of the remedial action taken by the trial court and the responses of the jurors, and especially in view of the fact that, at trial, appellant admitted on direct examination that he was absent without leave from Fort Stewart when he killed Boatright and Highsmith, we

find no error in the court's refusal to disqualify the entire jury panel for prejudice and bias.

7. Appellant's tenth and eleventh enumerations of error are not supported by argument or citation of authority. See Supreme Court Rule 45. We have nonetheless reviewed each asserted error pursuant to Rule IV (b) (2) of the Georgia Unified Appeal Procedure and conclude that neither has addressable merit.

8. When the case was called for trial, on January 25, 1982, appellant moved for a continuance on the ground that two witnesses subpoenaed by the defense on January 20 had not been served and were not present to testify. The sheriff testified that he had searched for, but had been unable to locate, these witnesses.

Appellant's attorneys admitted to the trial court that they had not talked to either witness. They contended, however, that, according to information they had, one of the witnesses had been inside Boatright's store when the shooting occurred and would testify that the shooting was not planned, but was the result of an argument; the other witness had been outside the store and had seen the first witness run out the door when the shooting started. No witnesses were offered to substantiate this information.

In our opinion, appellant failed to demonstrate that, had a continuance been granted, he would have been able to locate either of the witnesses. Nor do we think that appellant established, by anything other than speculation, that the testimony of the missing witnesses would have been material.[7] In these circumstances, the

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[7] At trial, neither appellant's testimony, nor any other evidence, indicated the presence of anyone inside the store, at the time of the robbery, other than appellant and his two victims.

trial court did not abuse its discretion by refusing to grant a continuance. OCGA § 17-8-25; Lee v. State, 154 Ga. App. 562 (4) (269 SE2d 65) (1980).

SENTENCE REVIEW

The jury recommended the sentence of death for each of the murders. The supporting aggravating circumstances found by the jury may be summarized as follows: The murder of Alfred Boatright was committed while appellant was engaged in the commission of two other capital felonies, the murder of Morris Highsmith and the armed robbery of Alfred Boatright; the murder of Morris Highsmith was committed while appellant was engaged in the commission of two other capital felonies, the murder of Alfred Boatright and the armed robbery of Alfred Boatright.

9. The doctrine of "mutually supporting aggravating circumstances" precludes simultaneous use of the murder of Boatright to support the death penalty for Highsmith and use of the murder of Highsmith to support the death penalty for Boatright. Burden v. State, 250 Ga. 313 (6) (297 SE2d 242) (1982); Waters v. State, 248 Ga. 355 (12) (283 SE2d 238) (1981); Gregg v. State, 237 Ga. 117 (210 SE2d 659) (1974). We therefore set aside the statutory aggravating circumstance that the murder of Highsmith occurred during the murder of Boatright.

Since at least one statutory aggravating circumstance remains to support each sentence of death, the elimination of one such circumstance does not require reversal of either sentence. OCGA § 17-10-30 (c); Zant v. Stephens, 250 Ga. 97 (297 SE2d 1) (1982). The remaining statutory aggravating circumstances are supported by the evidence. Jackson v. Virginia, supra.

10. The trial court did not err when it allowed the state to introduce evidence of appellant's prior record of convictions during the sentencing phase of the trial. OCGA § 17-10-2; Zant v. Stephens, supra; Horton v. State, 249 Ga. 871 (6) (295 SE2d 281) (1982). Appellant's twenty-sixth enumeration of error is meritless.

11. The sentences of death were not imposed under the influence of passion, prejudice or other arbitrary factor. OCGA § 17-10-35 (c) (1).

12. In his twenty-fifth enumeration of error, appellant contends the trial court erred in refusing to allow him to present to the jury, during the sentencing phase of the trial, evidence of penalties imposed in allegedly similar cases in the Waycross judicial circuit. We find no error.

A defendant may present, during the sentencing phase of a death penalty case, evidence relating to the defendant's character, prior record, or the circumstances of his offense. Lockett v. Ohio, 438 U. S. 586 (96 SC 2654, 57 LE2d 973) (1978); Franklin v. State, 245 Ga. 141 (7) (263 SE2d 666) (1980). See also Horton v. State, supra, divisions (4), (5) and (6). However, it is for this court, and not the jury, to determine whether a sentence of death is excessive or disproportionate to the penalty imposed in similar cases. OCGA § 17-10-35 (c) (3). The trial court properly refused to allow appellant to present to the jury evidence of penalties imposed in other cases, and this enumeration of error is meritless.

13. "The similar cases listed in the appendix support the death penalty in this case. Those cases

show that juries find that the death penalty is appropriate punishment where an adult is found to have been the actual perpetrator of, or active participant in, double murders committed upon victims who are unrelated to the defendant. Features frequently found in such cases are burglaries, armed robberies or kidnappings." Rivers v. State, 250 Ga. 288, 302 (10) (298 SE2d 10) (1982). In this case, appellant, an adult, was found guilty of being the actual perpetrator of the murder of two unarmed, elderly men during the armed robbery of a convenience store.

The sentences of death imposed in this case are neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Judgment affirmed. All the Justices concur.

APPENDIX

Pass v. State, 227 Ga. 730 (182 SE2d 779) (1971); Gregg v. State, 233 Ga. 117 (210 SE2d 659) (1974); Floyd v. State, 233 Ga. 280 (210 SE2d 810) (1974); Chenault v. State, 234 Ga. 216 (215 SE2d 223) (1975); Birt v. State, 236 Ga. 815 (225 SE2d 248) (1976); Peek v. State, 239 Ga. 422 (238 SE2d 12) (1977); Westbrook v. State, 242 Ga. 151 (249 SE2d 524) (1978); Finney v. State, 242 Ga. 582 (250 SE2d 388) (1978); Holton v. State, 243 Ga. 312 (253 SE2d 736) (1979); Waters v. State, 248 Ga. 355 (283 SE2d 238) (1981); Mathis v. State, 249 Ga. 454 (291 SE2d 489) (1982); Rivers v. State, 250 Ga. 288 (298 SE2d 10) (1982).

APPENDIX B

CHARGE BY THE COURT:

Members of the jury, you've found the defendant guilty of the murder of Alfred Boatright as charged in count one of the indictment, also of the murder of Morris Highsmith as charged in count two of the indictment, and of armed robbery of Alfred Boatright as charged in count

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three of the indictment. It is now your duty to determine within the limits prescribed by law the penalty which shall be imposed as punishment for the murder of Alfred Boatright and the penalty which shall be imposed as punishment for the murder of Morris Highsmith.

It is the duty of the Court rather than the jury to determine the penalty which shall be imposed as punishment for the armed robbery of Alfred Boatright, therefore, you, the jury are not to concern yourselves with any penalty to be imposed for the armed robbery. You are to determine, however, the penalty to be imposed for the two murders for which you have found the defendant guilty.

The law of this State provides that a person convicted of murder shall be punished by death or by imprisonment for life, therefore, it is for you, the jury, to determine in this case whether the defendant shall be punished by death or by imprisonment for life for the murder of Alfred Boatright, and whether the defendant shall be punished by death or by imprisonment for life for the murder of Morris Highsmith.

In reaching that determination you shall consider all of the evidence, fact and circumstances of the case which have appeared at both the guilt-innocence phase and at this pre-sentencing phase of the trial of this case, including any and all evidence in extenuation, mitigation

and aggravation of punishment.

Now members of this jury, the law of this State authorizes, but does not require, the imposition of the death penalty for the offense of murder only if one or more statutory aggravating circumstances are found to exist beyond a reasonable doubt. The statutory aggravating circumstances that you are authorized to consider with respect to the penalty to be imposed upon the defendant as punishment for the murder of Alfred Boatright and the statutory aggravating circumstances that you are authorized to consider with respect to the penalty to be imposed upon the defendant as punishment for the murder of Morris Highsmith will be submitted in writing to you by this Court for your deliberations, and are as follows: with respect to the penalty to be imposed upon the defendant as punishment for the murder of Alfred Boatright, the jury is authorized to consider the following statutory aggravating circumstances: (1) The offense of the murder of Alfred Boatright was committed while the defendant was engaged in the commission of another capital felony, to wit: the murder of Morris Highsmith, and (2) the offense of murder of Alfred Boatright was committed while the defendant was engaged in the commission of another capital felony, to wit: the armed robbery of Alfred Boatright

Now with respect to the penalty to be imposed

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upon the defendant as punishment for the murder of Morris Highsmith, the jury is authorized to consider the following two statutory aggravating circumstances. (1) The offense of murder of Morris Highsmith was committed while the defendant was engaged in the commission of another capital felony, to wit: the murder of Alfred Boatright, and the offense -- (2) the offense of murder of Morris Highsmith was committed while the defendant was engaged in the commission of another capital felony, to wit: the armed robbery of Alfred Boatright.

Now, members of the jury, before you would be authorized to find a verdict imposing upon the defendant the death penalty for the murder of Alfred Boatright, you would first be required to find that the evidence is sufficient to prove beyond a reasonable doubt the existence of one or more of the following statutory aggravating circumstances. (1) The offense of murder of Alfred Boatright was committed while the defendant was engaged in the commission of another capital felony, to wit: the murder of Morris Highsmith, and (2) the offense of murder of Alfred Boatright was committed while the defendant was engaged in the commission of another capital felony, to wit: the armed robbery of Alfred Boatright.

In considering the penalty to be imposed upon the defendant for the murder of Alfred Boatright, members

of the jury, even if you should find one or more of the statutory aggravating circumstances which I have just given you in charge to exist beyond a reasonable doubt, you are not required to impose upon the defendant the death penalty for the murder of Alfred Boatright, but you would still be authorized to, and may impose upon the defendant imprisonment for life rather than death.

Now before you would be authorized to find a verdict imposing upon defendant the death penalty for the murder of Morris Highsmith, you would first be required to find that the evidence is sufficient to prove beyond a reasonable doubt the existence of one or more of the following statutory aggravating circumstances. (1) The offense of murder of Morris Highsmith was committed while the defendant was engaged in the commission of another capital felony, to wit: the murder of Alfred Boatright, and (2) the offense of murder of Morris Highsmith was committed while the defendant was engaged in the commission of another capital felony, to wit: the armed robbery of Alfred Boatright.

In considering the penalty to be imposed upon the defendant for the murder of Morris Highsmith, members of the jury, even if you should find one or more of the statutory aggravating circumstances which I've just given you in charge to exist beyond a reasonable doubt, you are not required to impose upon the defendant the death penalty

for the murder of Morris Highsmith, but you would still be authorized to, and may impose upon the defendant imprisonment for life rather than death.

Now if you should find a verdict imposing upon the defendant the death penalty for the murder of Alfred Boatright, you must also designate in writing and sign by the foreman of the jury the aggravating circumstance, or circumstances which you find to exist beyond a reasonable doubt.

If you should find a verdict imposing upon the defendant the death penalty for the murder of Morris Highsmith, you must also designate in writing and sign by the foreman of the jury, the aggravating circumstance or circumstances which you find to exist beyond a reasonable doubt.

Now members of the jury, if, after considering all the evidence, facts and circumstances of this case which have appeared at both the guilt-innocence phase and at the pre-sentencing phase of the trial of this case, including any and all evidence, facts and circumstances in extenuation, mitigation and aggravation of punishment, you determine that for the murder of Alfred Boatright the defendant shall be punished by imprisonment for life, then the the form of your verdict would be: We the jury hereby determine that for the murder of Alfred Boatright the

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defendant shall be punished by imprisonment for life. And then you would date the verdict and the foreman would sign the verdict.

If, however, after considering all the evidence, facts and circumstances of this case which have appeared at both the guilt-innocence phase and at the pre-sentencing phase of the trial of this case, including any and all evidence, facts and circumstances in extenuation, mitigation and aggravation of punishment, you determine that for the murder of Alfred Boatright the defendant shall be punished by death, then the form of your verdict would be: We the jury hereby determine that for the murder of Alfred Boatright the defendant shall be punished by death, and we the jury hereby find to exist beyond a reasonable doubt the following statutory aggravating circumstance or circumstances: and then you would designate in writing the statutory aggravating circumstance or circumstances which the jury found to exist beyond a reasonable doubt.

Now members of the jury, if after considering all the evidence, facts and circumstances of this case which have appeared at both the guilt-innocence phase and at the pre-sentencing phase of the trial of this case, including any and all evidence, facts and circumstances in extenuation, mitigation and aggravation of punishment, you determine that for the murder of Morris Highsmith the

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defendant shall be punished by imprisonment for life, the form of your verdict would be: We the jury hereby determine that for the murder of Morris Highsmith the defendant shall be punished by imprisonment for life.

If, however, after considering all the evidence, facts and circumstances of the case which have appeared at both the guilt-innocence phase and at the pre-sentencing phase of the trial of this case, including any and all evidence, facts and circumstances in extenuation, mitigation and aggravation of punishment, you determine that for the murder of Morris Highsmith the defendant shall be punished by death, then the form of your verdict would be: We the jury hereby determine that for the death of Morris Highsmith the defendant shall be punished by death -- excuse me. The form of that verdict would be: We the jury hereby determine that for the murder of Morris Highsmith the defendant shall be punished by death, and we the jury hereby find to exist beyond a reasonable doubt the following statutory aggravating circumstance or circumstances: and then you would follow by designating in writing the statutory aggravating circumstance or circumstances which you the jury found to exist beyond a reasonable doubt.

Now, members of the jury, I am going to send out with you a form, typewritten form of each of the verdicts that I -- the forms that I have just read to you in charge

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For the punishment to be determined by this jury for the murder of Alfred Boatright, you will have both forms. One for imprisonment for life, and one for death. The same for the punishment for the murder of Morris Highsmith.

Now the Court can't designate in writing the circumstances, or aggravating circumstance or circumstances so that if you decide upon the death penalty the jury must add, in writing, designate in writing in that form of verdict that you'll have out with you those -- that aggravating circumstance or circumstances which you found to exist beyond a reasonable doubt.

Now members of the jury, your verdict must be agreed to by all twelve of you. It must, of course, be in writing, dated and signed by your foreman and returned by you into court for publication.

You may now retire to the jury room, but do not begin your deliberations until the evidence is delivered to you by the bailiff, also, the indictment, the aggravating -- statutory aggravating circumstance or circumstances which you are authorized to consider in each of the two verdicts that you are required to return. And also, the forms of the verdicts that you would be authorized to return as punishment in this case.

Mr. Bailiff, would you take the twelve jurors to the jury room.

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state any objection that you have to your defense counsel at this time. Do you have any objection to your defense counsel?

MR. WILSON: No, sir.

THE COURT: Do you have any objection to the manner in which your defense counsel has conducted, or is conducting the defense?

MR. WILSON: No, sir.

THE COURT: All right, this court will be in recess.

(THE PROCEEDINGS IN THE COURTOOM ARE RECESSED AT 4:20 P.M. AT 7:10 P.M. THE JURY IS RETURNED TO THE JURY BOX; THE FOLLOWING TRANSPIRES:)

THE COURT: Members of the jury, have you reached a verdict?

MR. FOREMAN: We have, Your Honor.

THE COURT: Would the Foreman hand the verdict to the Clerk, and would the Clerk publish the verdict.

MR. CLERK: (Reading verdict.) "In the Superior Court for the County of Pierce, State of Georgia State of Georgia versus Willie James Wilson, Jr. Indictment number 878.

"We the jury hereby determine that for the death of Morris Highsmith the defendant shall be

APPENDIX C

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punished by death, and we the jury hereby find to exist beyond a reasonable doubt the following statutory aggravating circumstances or circumstances: The offense of murder of Morris Highsmith was committed while the defendant was engaged in the commission of another capital felony, to wit: the murder of Alfred Boatright.

"The offense of murder of Morris Highsmith was committed while the defendant was engaged in the commission of another capital felony, to wit: the armed robbery of Alfred Boatright.

"This 6th day of February, 1982.

"Jacob R. Popham, Jr., Foreman."

"In Superior Court for the County of Pierce, State of Georgia, State of Georgia versus Willie James Wilson, Jr., Indictment number 878

"We the jury hereby determine that for the murder of Alfred Boatright the defendant shall be punished by death and we the jury hereby find to exist beyond a reasonable doubt the following statutory aggravating circumstance or circumstances:

"The offense of murder of Alfred Boatright was committed while the defendant was engaged in the commission of another capital felony, to wit: the murder of Morris Highsmith.

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"The offense of murder of Alfred Boatright was committed while the defendant was engaged in the commission of another capital felony, to wit: the armed robbery of Alfred Boatright.

"This 6th day of February, 1982.

"Jacob R. Popham, Jr., Foreman."

THE COURT: All right, let defense counsel examine the verdicts.

MR. PRITCHARD: (Examining verdicts.) Verdicts seem to be in proper form.

MR. STRICKLAND: State has no question as to the form.

THE COURT: All right, hand me the verdict so I can poll the jury.

Now, members of the jury, it is necessary that I poll each of you individually with respect to the two verdicts that have just been published, and as I call your name would you please stand and answer the questions which I will propound to you.

Mrs. H.M. Thompson. Mrs. Thompson, were these two verdicts your verdicts when they were reached in the jury room?

JUROR: Yes, sir.

THE COURT: Were they freely and voluntarily made by you?

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Report of the Trial Judge

of the

Superior Court of Pierce County, Georgia

The State vs. Willie James Wilson, Jr.
(A case in which the death penalty was imposed)

A. Data Concerning the Defendant

1. Name Wilson (Last) Willie (First) James, Jr. (Middle) 2. Date of Birth 11/8/56 (Mo. Day Yr)

3. Social Security Number 252 98 9988
4. Sex M [X] F [ ]
5. Marital Status: Never Married [ ]; Married [ ]; Divorced [X]; Spouse Deceased [ ]

6. Children
(a) Number of children -0-
(b) Ages of children: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
(Circle age of each child)

7. Father living: Yes [X] No [ ] If deceased, give date of death _____
8. Mother living: Yes [X] No [ ] If deceased, give date of death _____
9. Number of children born to parents Seven
10. Education--Highest Grade Completed: 1 2 3 4 5 6 7 8 9 10 11 (12) 13 14 15 16 [college
(Circle one)

11. Intelligence Level: (IQ below 70) Low [ ]
(IQ 70 to 100) Medium [ ]
(IQ above 100) High [ ]

12. Psychiatric Evaluation Performed: Yes [ ] No [X]
If performed is defendant:
a. Able to distinguish right from wrong? [ ] [ ]
b. Able to adhere to the right? [ ] [ ]
c. Able to cooperate intelligently in his own defense? [ ] [ ]

13. If examined, were character or behavior disorders found? Yes [ ] No [ ]
(If answer is yes, please elaborate) _____

14. What other pertinent psychiatric [and psychological] information was reveal

15. Prior work record of defendant:

Type Job	Pay	Dates Held	Reason for Terminatio
a. Fort Stewart	$700 & $900 monthly	Dec. 1979-June 19,1981	A.W.O.L.
b.			
c.			
d.			
e.			

*A separate report must be submitted for each defendant sentenced to death.

B. Data Concerning the Trial

1. Was the case tried with or without jury? With [X] Without [ ]

2. How did the defendant plead? Guilty [ ] Not guilty [X]

C. Offense Related Data

1. Capital Offense for Which Penalty Imposed:

a.	Treason	[ ]
b.	Murder	[X]
c.	Kidnapping for Ransom	[ ]
d.	Kidnapping where Injury Results . .	[ ]
e.	Aircraft Hijacking.	[ ]
f.	Rape	[ ]
g.	Armed Robbery	[ ]

2. Were other offenses tried in the same trial? yes [X] no [ ]

If other offenses were tried in the same trial list those offenses.

a. Armed Robbery

b. _____

c. _____

d. _____

3. If tried with jury, did the jury recommend the death sentence? Yes [X] No [ ]

4. Statutory aggravating circumstances found: Yes [X] No [ ]

5. Which of the following statutory aggravating circumstances were instructe and which were found?

	Instructed	Fou
a. (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or	[ ]	[
(2) The offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.	[ ]	[
b. (1) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery or	[X]	[
(2) The offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.	[ ]	[
c. The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	[ ]	[

		Instructed	Found
d.	The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.	[ ]	[ ]
e.	The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.	[ ]	[ ]
f.	The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	[ ]	[ ]
g.	The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.	[ ]	[ ]
h.	The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	[ ]	[ ]
i.	The offense of murder was committed by a person in, or who has escaped from the lawful custody of a peace officer or place of lawful confinement.	[ ]	[ ]
j.	The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.	[ ]	[ ]

6. List nonstatutory aggravating circumstances indicated by the evidence, if any.

a. Burglary

b. Criminal Damage to Property, 2nd Degree

c. Obstruction of Officer; Speeding; Driving without License; Leaving

d. Scene of Accident

7. Was there evidence of mitigating circumstances? Yes [X] No [ ]

8. If so, which of the following mitigating circumstances was in evidence?

a. The defendant has no significant history of prior criminal activity. [ ]

b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. [ ]

c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. [ ]

d. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct. (Claimed provocation because of victim's language used toward him and justification because he thought victim was going for a gun. [X]

e. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor. [ ]

f. The defendant acted under duress or under the domination of another person. [ ]

g. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. [ ]

h. The youth of the defendant at the time of the crime. [ ]

i. Other.
Please explain if (i) is checked _____

_____

_____

9. If tried with a jury, was the jury instructed to consider mitigating circumstances? Yes [X] No [ ]

10. Does the defendant's physical or mental condition call for special consideration? Yes [ ] No [X]

11. Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt? Yes [X] No [ ]

12. Was the victim related by blood or marriage to defendant? Yes [ ] No [X]

13. If answer is yes, what was the relationship? _____

_____

_____

14. Was the victim an employer or employee of defendant?
No [X]
Employer [ ]
Employee [ ]

15. Was the victim acquainted with the defendant?
No [X]
Casual Acquaintance [ ]
Friend [ ]

16. Was the victim local resident or transient in the community?
Resident [X]
Transient [ ]

17. Was the victim the same race as defendant? Yes [ ] No [X]

18. Was the victim the same sex as the defendant? Yes [X] No [ ]

19. Was the victim held hostage during the crime?
No [X]
Yes - Less than an hour [ ]
Yes - More than an hour [ ]

20. Was the victim's reputation in the community:
Good [X]
Bad [ ]
Unknown [ ]

21. Was the victim physically harmed or tortured? Yes [X] No [ ]
If yes, state extent of harm or torture: _____

Fatally shot with a .38 caliber pistol

_____

_____

22. What was the age of the victim? Alfred Boatright-65; Morris Highsmith-59

23. If a weapon was used in commission of the crime was it?

No weapon used	[ ]
Poison	[ ]
Motor Vehicle	[ ]
Blunt Instrument	[ ]
Sharp Instrument	[ ]
Firearm	[X]
Other _____	[ ]

24. Does the defendant have a record of prior convictions? Yes [X] No [ ]

25. If answer is yes, list the offenses, the dates of the offenses and the sentences imposed?

	Offense	Date of Offense	Sentence Imposed
a.	Criminal Damage to Property, Misd.	1974	Youthful Offender Act - 6 years
b.	Obstruction of Officer, Speeding, Driving w/o License, Running Stop Sign	1974	
c.			
d.	Burglary	1976	5 years

26. Was there evidence the defendant was under the influence of narcotics or dangerous drugs at the time of the offense? Yes [ ] No [X]

27. Was the defendant a local resident or transient in the community?

Resident	[ ]
Transient	[X]

D. Representation of Defendant *

1. Date counsel secured July 2, 1981

2. How was counsel secured? a. Retained by defendant [ ]
   b. Appointed by Court [X]

3. If counsel was appointed by court was it because
   a. Defendant unable to afford counsel? [X]
   b. Defendant refused to secure counsel? [ ]
   c. Other (explain) _____

4. How many years has counsel practiced law? a. 0 to 5 [ ]
   b. 5 to 10 [ ]
   c. over ten [X]

5. What is the nature of counsel's practice? a. Mostly civil [ ]
   b. General [ ]
   c. Mostly criminal [X]

6. Did the same counsel serve throughout the trial? Yes [X] No [ ]

7. If not, explain in detail _____

* (If more than one counsel served answer the above questions as to each counsel and attach to this report.)

E. General Considerations

1. Was race raised by the defense as an issue in the trial? Yes [X] No [ ]
   Claimed victim made racial slurs.
2. Did race otherwise appear as an issue in the trial? Yes [ ] No [ ]
3. What percentage of the population of your county is the same race as the defendant?
   a. Under 10% . . . . . [ ]
   b. 10 to 25% . . . . . [X]
   c. 25 to 50% . . . . . [ ]
   d. 50 to 75% . . . . . [ ]
   e. 75 to 90% . . . . . [ ]
   f. Over 90% . . . . . [ ]
4. Were members of defendant's race represented on the jury? Yes [ ] No [ ]
5. If not, was there any evidence they were systematically excluded from the jury? Yes [ ] No [ ]
6. Was the jury instructed to exclude race as an issue? Yes [ ] No [ ]
7. Was there extensive publicity in the community concerning this case? Yes [X] No [ ]
8. Was the jury instructed to disregard such publicity? Yes [ ] No [ ]
9. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [ ]
10. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [ ]
11. If answer is yes, what was that evidence? _____
12. In your opinion, was the death sentence imposed in this case appropriate? Yes [X] No [ ]

General comments concerning your answer: _____

F. Chronology of Case

		Elapsed Days
1.	Date of Offense June 22, 1981	
2.	Date of Arrest June 30, 1981	8
3.	Date Trial Began January 25, 1982	217
4.	Date Sentence Imposed February 6, 1982	229

5. Date post trial motions ruled on n/a

6. Date Trial Judge's Report Completed 6/28/82

7. *Date received by Supreme Court _____

8. *Date sentence review completed _____

9. *Total elapsed days _____

*To be completed by Supreme Court

This report was submitted to the defendant's counsel for such comments as he desired to make concerning the factual accuracy of the report, and

1. His comments are attached ( )
2. He stated he had no comments ( )
3. He has not responded (X)

6-28-82
Date

Clarence D. Peterson
Judge, Superior Court of

Pierce County

APPENDIX E

States Enumerating a Nonexclusive List of Mitigating Circumstances and which Require "Weighing" of Aggravating and Mitigating Circumstances:

Alabama	ALA. CODE 13A-5-48.
California	CAL. PENAL CODE 190.2,3.
Florida	FLA. STAT. ANN. 921.141 (West, 1982 pocket part).
Indiana	IND. CODE ANN. 35-50-2-9 (Burns 1979 repl. vol.).
Maryland	MD. ANN. CODE 27-413 (1982 pocket part).
Massachusetts	MASS. GEN. LAWS ANN. 279.69 (1982 supp.).
Mississippi	MISS. CODE ANN. 99-19-101 (1982 pocket part).
Missouri	MO. REV. STAT. 40A-565.012 (1979).
Nebraska	NEB. REV. STAT. 2902522(2) (1979).
Nevada	NEV. REV. STAT. 175.554(1c) (1981).
New Jersey	N.J. STAT. ANN. 2C:11-3(3) (West 1982).
New Mexico	N.M. STAT. ANN. 31-20A-2(B) (1978).
North Carolina	N.C. GEN. STAT. 15A-2000 (1981 cum. supp.).
Ohio	OHIO REV. CODE ANN. 2929.03 (Baldwin 1982).
Wyoming	WYO. STAT. 6-4-102 (1977).

States Enumerating Nonexclusive Statutory Mitigating Factors:

Alabama	ALA. CODE 13A-5-51.
Arizona	ARIZ. REV. STAT. ANN. 13-703 (1982 pocket part).
Arkansas	ARK. STAT. ANN. 41-1304.
Colorado	COLO. REV. STAT. 16-11-103 (1978).
Connecticut	CONN. GEN. STAT. 53a-46a (1983 pocket part).
Florida	FLA. STAT. ANN. 921.141 (West 1982 pocket part).
Illinois	ILL. STAT. ANN. 7A.04 (Smith-Hurd 1982 pocket part).
Indiana	IND. CODE ANN. 35-50-2-9 (Burns 1979 repl. vol.).
Kentucky	KY. REV. STAT. 532.025 (1981 cum. supp.).
Louisiana	LA. CODE CRIM. PROC. ANN. 905.5 (West 1983 pocket part).
Maryland	MD. ANN. CODE 27-413 (1982 pocket part).
Massachusetts	MASS. GEN. LAWS ANN. 279.69 (1982 supp.).
Mississippi	MISS. CODE ANN. 99-19-101 (1982 pocket part).
Missouri	MO. REV. STAT. 40A-565.012 (1979).
Montana	MONT. CODE ANN. 46-18-304 (1981).
Nebraska	NEB. REV. STAT. 29-2523(2) (1979).
Nevada	NEV. REV. STAT. 200.035 (1981).
New Hampshire	N.H. REV. STAT. ANN. 630.5 (1981 supp.).
New Jersey	N.J. STAT. ANN. 2C:11-3(5) (West 1982).
New Mexico	N.M. STAT. ANN. 31.20A-6 (1978).
North Carolina	N.C. GEN. STAT. 15A-2000 (1981 cum. supp.).
Ohio	OHIO REV. CODE ANN. 2929.04 (Baldwin 1982).
South Carolina	S.C. CODE ANN. 16-3-20(b) (1982 supp.).
Tennessee	TENN. CODE ANN. 39-2-203 (1982).
Utah	UTAH CODE ANN. 76-3-207 (1978).
Virginia	VA. CODE 19.2-264.4 (1982).
Washington	WASH. REV. CODE ANN. 10.95.070 (1982).
Wyoming	WYO. STAT. 6-4-102 (1977).

AFTER WHICH THE JURY RESUME SEATS IN THE JURY BOX; THE FOLLOWING THEN TRANSPIRES:)

THE COURT: Mr. Pritchard, you may proceed with the defendant's closing argument.

MR. PRITCHARD: Thank you, Judge.

CLOSING ARGUMENT BY MR. PRITCHARD:

Ladies and gentlemen of the jury, I know that you are probably glad this case is coming to a conclusion. I know probably during the time you probably heard -- got tired of hearing me talk so. Or all of us. But I ask you at this time to bear with us a little bit longer, because there's one thing for certain, as Mr. Strickland said, he thanked you for your kind attention. Mr. Sams. There's two other people in this courtroom that's got just as much of a burden as anyone else in Pierce County. You might have a burden in your heart in deciding this case. You had to sit here and listen to the evidence. But this Court placed upon John Thigpen and I a burden even greater, to see that he is given a fair trial by a jury of his peers.

And listening to Mr. Sams and Mr. Strickland, I wondered what I could say to you. Is there anything that I can say? Mr. Strickland and Mr. Sams apparently -- Mr. Sams says, "We know you're not gullible." I hope you don't think that I or Mr. Thigpen either one stand here and try to deceive you in any way, shape or form. That's not our

business to deceive you. We don't want to deceive you. This is a court of law, court of justice, and that is all that we are asking for, and want to ask at your hands. Regardless of whether he's guilty or not, he is entitled to be tried upon the truth as to what happened.

Oh, I listened to Mr. Strickland and I wondered in his very beginning what was going to happen in this case, what all the build-up? Why all this other stuff? They had a confession of the man. Had a tape. You heard it. I guess they thought John Thigpen and I was going to get up here and make him lie and change his testimony and everything else to deceive you. All we want is the truth, too, and that's what we're asking for, the truth. They want you to believe this is just a little country store, and two gentlemen sitting in the chairs inside there. And he walked in and just shot them, while they were sitting down talking. It's the most ridiculous thing I have ever heard of in my life. The facts do not show it. So why should they perpetrate a lie on you? If one is perpetrated, that's it. The audacity to stand here and place chairs like this, and say, "He stood here and shot one this way and that way." Ladies and gentlemen of the jury, look at this chart. I want to discuss it some more. Why would the Assistant District Attorney put the man facing the wall? That's what he's done. Why? To go on their own testimony? Why? My

God, why? They want to say he went over and opened that beer ccoler. Who just as logical could have went and opened the beer cooler? Morris Highsmith.

You know, ladies and gentlemen of the jury, Morris come up -- even Sue Nell told you it was hot that day. Apparently she didn't have the air conditioning on. She said, "We did have air conditioning. It wasn't on that day." When her daddy and them come up, she went outside and got some ice to get her something cold to drink. So what do you think Morris Highsmith would have done when he went out there standing in that sun, when he got there? Pumped his gas in, and it's just as likely he'd have walked back there to that cooler and started to get him a drink out of it, a beer or anything else. What evidence do you have that that man ever touched that beer cooler?

I'm not asking you to turn him loose, to walk him out the door, as Mr. Sams might say. Or turn him free. No, I am not. I'm asking you not to convict him on a lie. Let the truth speak. And he can't speak it, cause he stutters and carries on. And might be scared to death. But I tell you one thing. He did stand on that witness stand, for over two hours with Deen Strickland hammering at him. And in my opinion, he did outlast Mr. Strickland. He didn't have to depend on outright lies, suppositions, and to try and trick you into believing Morris Highsmith had walked in and sit

with his back to the wall, to the outside, and was facing the wall. That's what he's tried to tell you. Look at this photograph. Said, "Oh, you couldn't see." Here's a six foot wall here. Here's a cash register. Here -- with the cash register right there, and I guarantee you, I could point right back there and shoot Mr. . . just as quick as anything in the world. As high as it is. I only have to have a thing here. I could put this thing right there, and he'll have this one, and I could see the man in the corner standing there at the counter. Try to deceive you by bringing this little old bitty photograph up here, say you can't see through the door and everything else. Is that justice? Is that fair? No. Photographs are as deceptive as they can be. Talk about fairness, justice. Where is it? The whole gist of it?

Why would they say, "Oh, just sitting in the chair and he walked in there and killed them"? Now ladies and gentlemen of the jury, this is the most ridiculous thing I have ever heard. And I wondered, and wondered and wondered about these things. I don't know why he did, but human nature tells you there's some reason. There's places robbed every day with guns. And nobody's ever shot. Nobody's ever shot. But the trouble is, the robber, 90% of the time, is more scared than his victim. More scared, if he is robbing. More scared.

So we look at all these things, and just take

the facts. Go in there and look to yourself. They have come up here and said, oh, he would steal, he would lie. But what are they trying to do? Prove their own case wrong? Are they trying to prove their own case wrong? The officers say he told them what happened. Is one of these experts contradicting one thing he said happened out there? Have one of them? The only experts that have are Mr. Sams and Mr. Strickland. Putting Highsmith here, and they'd have to shoot him, cause the chair wouldn't have been there. This chair was sitting way back here in this corner. From here, there was no way he could have shot him in the left arm. This is the counter. Look at it. The way it's drawn out. Put it right there. This is your counter right there. That chair's over there, and it's no way. And it had to be within this distance. There's no way he could have shot him in the right arm. No way, with him sitting down. And I'll challenge Mr. Sams or anyone else in that direction to try it, or do it. The gun would have had to been way back over here, not right there where you're standing. And you take that chair that's in that corner there. It was way over there in the corner facing that way, and he wants you to believe now, that the chair was turned around this way. There's no way he'd been facing the wall. Absolutely none.

Now here's old Morris Highsmith -- now they say this, there was another chair there. But why would Morris

have turned that chair -- this chair here, why would he have turned it into the wall, so he could have been shot in the left shoulder? I'll assure you, both of these chairs was turned around. If anything, they would have been turned toward that television set. If anything. And there would have been no way he could have stood right here and shot him in the back, and shot him in the left arm. No way possible. What . . you believe that. What difference does it really make? Except their own theory. Their own theory. Go to all that trouble of getting these boots and bringing them into court. That's his sock. There's a sock in there. There's his boots. What one item in there shows you that this man killed anybody? What does it show, or prove? Absolutely, unequivocally nothing. What does anything in bag? I don't know how much. Three carloads of officers went all the way to Jacksonville to get it and bring it back here, and clutter up the clerk's office. And here, what does it prove? What does it prove? Absolutely, positively nothing. Nothing. Do these shells prove he killed anybody? Said he bought them right down the street. Let's convict him cause he's a gun-nut. You all better convict me, too, cause I'm a gun-nut. I got a bunch of them in my home. I got one in my car. I don't have one on me now, but it won't be long before I could get me one. I love to carry guns. I like to shoot snakes. I never shot no human being. But

why? I love to have a gun. So, convict him cause he's a gun-nut. These things here, all of this. He admits he shot him. He admits he fired two shots in that room. What does that prove? What does it prove? Absolutely, unequivocally nothing.

Now, Mr. Sams had the chair pointed this way while ago. And he says he was over here and he shot him in the left shoulder and he fell out of the chair. Fell out of the chair like this, went down. All right, ladies and gentlemen, look at these photographs. If he was pointed towards the wall, his head would be over towards the wall. Not out by the cookie thing. What he did when he went over to the drink cooler to get him a drink. Now, it was most reasonable, ladies and gentlemen of the jury. What did Sue Nell do before she left? She counted the money. Checked up. What do you think her father, Alfred Boatright, would do when he came in? Say? The man is taking over the store. Don't you think he would turn around and check the cash register, too? Isn't it just as reasonable to assume that Alfred Boatright walked in that store. Sue Nell was leaving. And Mr. Boatright took the money out and was counting it, counting it. I think you'll find here the cash thing out, right there. Took it out, put it right there. And had the money laying there counting it. And at that time, they had finished gassing up outside and the defendant did walk in.

ARTICLE 2

DEATH PENALTY GENERALLY

Cross references. — As to constitutional guarantee against deprivation of life without due process, see Ga. Const. 1976, Art. I, Sec. I, Para. I.

U.S. Code. — For provisions of Federal Rules of Criminal Procedure, Rule 38, relating to the death penalty, and annotations pertaining thereto, see 18 U.S.C.A.

17-10-30. Procedure for imposition of death penalty generally.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed. (Code 1933, § 27-2534.1, enacted by Ga. L. 1973, p. 159, § 3.)

Cross references. — As to time limitation on prosecutions for crimes punishable by death, see § 17-3-1. As to presentence hearings in death penalty cases, see § 17-10-2.

Law reviews. — For article opposing capital punishment in Georgia, see 15 Ga. St. B.J. 159 (1979). For article supporting capital punishment in Georgia, see 16 Ga. St. B.J. 48 (1979). For article surveying Georgia cases in the area of evidence from June 1979 through May 1980, see 32 Mercer L. Rev. 63 (1980).

For comment analyzing and criticizing the 1973 capital punishment statute in light of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), see 24 Mercer L. Rev. 891 (1973). For comment on Alderman v. State, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 666 (1978), see 31 Mercer L. Rev. 349 (1979).

JUDICIAL DECISIONS

Analysis

General Consideration
Mitigating Circumstances
Aggravating Circumstances
1. In General
2. Prior Convictions
3. Crime Committed While Engaged in Commission of Other Crimes
4. Outrageously or Wantonly Vile, Horrible, or Inhuman Circumstances
5. Murder of Peace Officer, Corrections Employee, or Fireman, or for Purpose of Avoiding, Etc., Arrest or Custody

Mr. Highsmith did follow him. No question about that. Mr. Highsmith followed him in the door. It was hot outside. I don't know if he went and opened the door or not, of the cooler. But there's one thing for certain, there's absolutely no evidence that the defendant opened it. So, maybe he was there getting him a drink. And all of a sudden, when Willie James Wilson said, I didn't have enough money to pay for it, an argument did break out. And wouldn't Morris Highsmith immediately, if he heard two arguing at the cash register, turn and go towards that cash register to see what was going on?

You know, it was a funny thing. Every one of these officers stood on that stand -- intelligent, brilliant officers. No, there was no weapon there. Couldn't have . . a weapon. Hu huh. No guns, no nothing. I asked him, I said, "Well, what's this over here in this corner right here by his feet?" "Oh, that's the leg of a table." "Leg of the counter," he said. Excuse me. Leg of the counter. Somehow find State's Exhibit Number 13. I want you to look at it. Look at that there thing, the leg of the counter, right there laying at his feet. Take a look at it. What is it? Leg of a counter. And I'd hate to face any man with it, right here. Now what -- you think they just left that laying there? On the floor. No weapon whatsoever. There is is. Plain view. You could kill a man. You could beat him to death in a hurry

with it. Is that what Morris Highsmith reached down and picked up when he was shot? Was it? If we're going to be fair to all of us, is the officers being fair there? To make you believe that no such weapon was even there? I think any one of you can tell. That is more . . You can't tell exactly where this body was. Photographs at the angles you take them can be awful deceptive. Cause they draw this photograph here, just like this here. And he went in there and he put him clean out here. His legs was clean out back of that counter. With his head way out here. Look a there. Big old thing. They got Morris Highsmith sitting in the chair facing the cash register now. If he was doing that, look where his right arm is, over here. He'd had to shoot him through the wall. Could have shot him in the right shoulder. Just as simple as simple can be. All going . . .

Trouble is, looking at these photographs, ladies and gentlemen of the jury, said there was blood on this chair. There was blood all over the floor. The EMTs that picked Mr. Boatright up had to get blood on their shirt if they were down there working with him trying to stop the bleeding. And the EMTs that moved the chair would have had to had blood on his hands. That's where it come from. Other chair the same way. They had to move both of them. All of this to-do. And what are we to do about?

But just so -- just so that they want you to

believe the old men just sitting in the chair, doing nothing when they were executed. Let's look at all this . . ladies and gentlemen of the jury. Deen Strickland did make sense when he said that he was sitting in this chair and his life, live out the rest of their years like the good Lord will let them do. That's what they wanted to do. I'm not going to bring the Lord on this. God might have had a hand in it. He might have had a hand. I don't know. I don't know.

But there are so many different things. Like he said that he had $200. Said he first came over here with a couple of hundred dollars on him. Came back. Said you were making nearly one thousand dollars a months. He said, "Not after taxes and all this other stuff, I wasn't, Mr. Strickland." He kept saying and even arguing, the government was paying him over a thousand dollars a month. Well, here's his JUMPS Army pay, one of them. Now, I know it's dated back from the 1st to the 30th of April, '81. . . show total . . $980.40 something . . allotment collections $2.00. Others $129.83. Net earnings -- that was deductions for something. Net earnings $849.47. Mid-month payment $424.00. So around June 15th, is there anything unusual if you got paid $424 that he wouldn't have had $200 then? Between June 15th. As bad as it is, I doubt if he paid his rent over there, cause he left. So is he lying to you about having some money when the State itself clearly shows you -- clearly, unequivocally

shows you mid-month payment $424. And also around the 30th of each month, deposited in the bank would have been $425. It's right here. It's all on here what he would have received. Said, why did he go to that bank to get money? Because they have a guaranteed deposit of $427 to the Hinesville Bank. And that amount would be going to his bank every month. That's all this is. A statement showing his money does go to the bank each month, the 15th and the 30th. So they must think -- he just lied about everything. Just completely lied about everything.

Now I know your law enforcement officers did an excellent job. They have done a good job. But the whole gist of the facts is, do we convict a man on the muddied water -- do you convict him on the fact that he lied on the application for a job? Do you convict him on the fact that he said he was a sergeant? Do you convict him on the fact that he drove a yellow Grand Prix and the left door wouldn't work? And all of these things. No, ladies and gentlemen, you do not, and should never.

Mr. Strickland says the truth will stand when the world is on fire. And we know that is exactly what will happen. Ladies and gentlemen of the jury, you have heard all these facts in the evidence. He is charged in count one of this indictment that, "Willie James Wilson, Jr., on the 22nd day of June, 1981, did unlawfully and with malice

aforethought cause the death of Alfred Boatright, a human being by shooting him with a pistol, a deadly weapon. And count two of this indictment, he was charged with, "Did unlawfully with malice aforethought cause the death of Morris Highsmith, a human being, by shooting him with a pistol, a deadly weapon." So here he is charged with two counts of murder. Now, this is what we call malice murder. You can -- in murder, a person commits murder when he unlawfully and with malice aforethought, either expressed or implied, causes the death of another human being. That's all. . requires. Of course the judges charge you express malice is that deliberate intention, unlawfully, to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice.

Now, ladies and gentlemen of the jury, so therefore, Willie James Wilson told you all this that happened. He stopped there at the 121 Club that day, he did go in and get him a beer. He did go down there and I think the evidence from Sue Nell Boatright clearly showed she had just seen a yellow car. She had sold a black man a pack of cigarets. They were going to make something to do with why he smoked one kind one minute and one the next. But if he wasn't smoking Kool cigarets, and hadn't been smoking Kool cigarets, I think the Sheriff or some officer would have got up here and tell you what he's smoking up

there in jail, if it ain't Kool cigarets. I don't think there's any doubt the type he was smoking that day, and the type he did. But what difference would it have made, whether he told you it was Viceroys or cigars or what? The evidence was he went in there and bought a pack of cigarets. There is absolutely no doubt, no question that he did go by that place. No doubt that Sue Nell was there in that place. And there is no doubt it would have been a lot easier to have robbed her than it was them two men. So we have to look at his actions, his intent. He did go down there. He turned around, regardless of whether his car, his radiator was bad, or he stopped. The fact is, he did stop. He told you he stopped. There's no doubt he did turn around and he come back and pulled up to the gas pump.

He said he did have $25 when he left that morning. Something like that. I don't know if Willie James Wilson actually knew exactly how much he had on him. How much he did spend that day, or what. Or what his intentions were. But there was one thing for certain. We're not talking about stealing gas. We're talking about murder, malice aforethought. Did he? Two places there. And there's no question. There's places between here and Hoboken. There's places in Hoboken if he wanted to rob something. There's all kind of small groceries. Two or three between Hoboken and Waycross. Some on the outskirts. Some on the

other side. They come by Larisey's out here. He's right out there in the middle of nowhere. If they'd wanted to rob somebody. There's absolutely no evidence that he even knew where Boatright's place was down there. But one thing for certain, he did pull back up there. Now, when he pulled back up, back up to that service station, if you will recall the testimony, when -- what was his name, went by there -- the farmer out there that come by and he had seen the people there. Went to Turner's down there. Pernal Sapp. He said he drove by. He saw this car down, parked. And when he came back by -- when he came back by, that yellow car was parked at the pump there. This black man . . Terry's truck was there. Sue Nell's car was there. Morris Highsmith was putting gas in that car at that time. So therefore, Terry had been there. And he was there when Sue Nell was there. He came up and got in Mr. Boatright's car and left. He left his truck, and got in Mr. Boatright's car. So therefore, there was Terry -- there's no evidence -- she swears she met him coming when he walked inside. When she walked out the door, she met him going in. So Sue Nell was there. Morris Highsmith was there, and her father. So therefore, when he pulled up there, he wasn't going to rob the store with just that one person there. There was four of them. There was absolutely four of them.

And you can look at these photographs. Morris

wasn't no little fellow. And neither was Mr. Boatright. Certainly don't let the gray hair fool you. That sure don't mean that you're not still much of a man.

But he did -- I don't know if he didn't know how much gasoline he had in there. But that man walked inside, and he said they did get in an argument because he couldn't pay for the gas. And in the flick of a moment, in fury, as Mr. Morris Highsmith reached down . . and turned. Now, you look at these photographs and it will be just exactly like he said. As I had that doctor up here, I actually went up here and measured it, so I would know, and you would know. With Mr. Highsmith standing. Right here, I put the doctor here. And measured to his back, and down his arm where it would go through here. He had his arm up just a little bit like this at that time. That boy here would have been standing about like that, at that angle. Anyone ever fired a gun at any target less than 25 feet, you don't put it out. It's very simple. Because within two feet, you try to hold it out, and the man will take it away from you and beat you to death with it. It's the mere fact of shooting at close range. They say he's -- oh, he's an expert. He is such an expert. But you look at this photograph here. The boy is such an expert with firearms, and everything else and took so much target practice. What did that doctor say? Said doctor -- it grazed the skin back there, didn't it. You

can see where it grazed it right there before it went in. Slid along the skin. He actually like to have missed him. It's just as clear as could be, it like to have missed him. And slid in right through there into the thorax vertebra and went through his spinal cord and that's what got him. Very simple, simple could be. And that's exactly what -- I want you to do this. It hit that vertebra back there. You'll notice this one right here, it's marked on the back there, move from Boatright. This bullet didn't even hit him, break his arm. It went through the flesh. Missed the bone. Through the inside, the skin. And wound up in the flesh over here. Just as round, and there are not a mark on it. You know why? It did not hit a bone. When you hit the spinal column or vertebras, what happens to the bullet? Came out of Morris Highsmith. Bones will even dent it. Will dent it. That bullet like to have completely missed Morris Highsmith.

Now, they still want you to believe that -- Mr. Strickland says, well, you see him laying there. No, he didn't see him laying there. He said he grabbed that money and ran. He ran. Now, ladies and gentlemen of the jury, use your own knowledge, your own good, common sense. He says he wanted to leave a witness dead. Wanted to leave him dead. Is there any evidence at that time that he would have known Morris Highsmith was dead? Is there absolutely

any evidence whatsoever that he knew Mr. Boatright was dead? Even your doctor testified that Mr. Boatright possibly could have lived if he'd got surgery. He was bleeding. How long does it take him to bleed to death? Apparently -- this thing happened about 4:00. By 4:03 he was on the telephone. He was still talking; he was still conscious. Still moving. Still had the intelligence to call the operator, get us help. Two of us have been shot at Boatright's Handi-Shop at Bristol. Even a few minutes later the operator called back, he said, "Thank you, and hurry. Tell them to please hurry." So the ambulance went out there. It took the doctor 45 minutes there in the hospital to finally determine, and declare him dead. So therefore, when Willie James Wilson left out of there, he wasn't dead. Willie James Wilson didn't know whether he was dead or not. You think he went around there and turned them over and looked at them to see if he'd hit them, or what? Or if they even fell or what. He grabbed that money and ran with it. I'll guarantee you one thing. If he was a cold, callous killer, like Mr. Deen Strickland said he was, it would have been no doubt in your mind or anyone else, because he would have walked behind that counter, and he would have took that gun, and you would have found a bullet hole right in the back of Morris Highsmith. And he'd have walked right over here. And he might have had to put two more in Mr. Boatright to get him down. And when he fell,

you would have found a bullet in the back of his head. He would have known he was dead, if he had intended to kill him. And you can't say he was fixing to run. He could see out the window and out the door. There wasn't nobody out there.

You know, acts speak louder than words. Acts speak so much louder, cause that is the way it said it happened. He did grab that money off the counter. And isn't it reasonable to say that Mr. Boatright was counting it? Yes. So easy. But ladies and gentlemen of the jury, look at this. What do you have in this case? You say this. Let's convict him because he stole the gun from his daddy, Willie James Wilson, Jr. Stole it from his daddy, Willie James Wilson, Sr. He was the first one testified. That makes him guilty. Did Prince D. Duncan tell anything except back 1974 his daddy bought a pistol. But Deen Strickland and Fletcher Sams wants you to think that he's so sinister he's got that gun hid somewhere where he can go back and get it. No evidence to that effect. Really, what difference does it make if it was stole out of his car in Jacksonville, or at the bottom of the Saint Mary's River? What difference does it make? Or hid in Jacksonville? He said, "I did shoot that gun. I didn't know I'd killed them when I left." Are we going to hold it against him cause he went to Jimmy Cribb. He said he needed some money. Deen says he was going down there to rob, but he went in and applied for a job. He

applied for a job to work in the woodyard there. Same thing him and Darris Miller said they were supposed to go to work that day. He did want to earn some money. Wasn't completely broke, cause Wes Highsmith said he paid him at least $3. Of course, Carol Herrin, the whole facts there, it don't matter. Every body is capable of making mistakes. He dated it the 23rd, ready to go to work in the 23rd. You know and I know that's a mistake. It's the 22nd. Is there any reason to doubt it was the 22nd? None whatsoever. Lot of folks don't know what day of the week it is. Like Wes Highsmith said, he said one of them got out and went to the bathroom. Wes has a lot of people in there, but it don't really matter. He was there, his car was there. It don't matter how much, if he paid him $3 or $4 or $5 worth of gas. It is his gas. Denny Hill went out there and found the slug. Did he deny firing his gun out there two or three times? John Pike went over there and recovered some things from the boy's daddy. Roy Blackstock saw the car parked over there. One night he followed it down Lee Street with two people in it. Really that doesn't show anything. Edsel Yeomans, he was the bartender at 121 Club. He saw him there. He didn't see no weapon on him, no. What was his reason? Joe said he got scared, went and got his gun. What did he do to make Joe scared? Intuition, I guess. Parnell Sapp said so-and-so. Sue Nell Boatright. She testified. She identified him by

his mean eyes. Faye W. Aspinwall, telephone operator. Certainly doesn't show anything as far as the defendant being guilty. Tommy Roberts the same thing. Took the telephone call. We certainly don't deny the telephone calls were made. Glenn Gillis, he was the first officer in that thing, and he couldn't tell you who moved that chair, who moved the body. He said it was laying face-down. EMTs thinks he moved it over. Of course, even GBI agent told you when he got there, Lee Sweat, that he turned it over and looked at his back. Glenn Gillis went all over th building. Only thing Dr. Donald Zorn could tell you that one of them lived 45 minutes, the other was already dead. Laura Cooper saw a yellow colored car come through Patterson. Come off the Tyre Bridge Road.

After it all happened, he came back to Blackshear, got his stuff. I don't know apparently, right there is his worldly possessions. There, and his car. Took off and went to Waycross, they say. Then he did stop in Folkston. You know, Deen Strickland, oh, made so much about, well, your place is off of U.S. 1. Couple of blocks over from U.S. 1. Yes, it's over there. You can't quite see it from U.S. 1. Did Mr. Strickland actually expect him to be going down U.S. 1? But he did stop there. There's no doubt. He stopped there. He bought a rag to wipe his car with. Some Armoral to clean the vinyl with. And what did he say when Mr. Strickland asked him, "Why did you do

that?" Stopped down there and he said he slept a little while. Why? I was so scared, and my heart was beating so fast, I had to do something just to calm down. And he stopped and washed his car. His heart was beating so fast. Now, is that -- isn't that reasonable? Didn't know what he was going to do. He knew he had done wrong. . . Patel. He did stop at the motel. There's no if, ands, or buts about it. He stopped at the motel. He told you he stopped at the motel. R.N Assaf gave him a ticket. Mr. Strickland says, "Let's convict him because he went to the movie." Convict him cause he went to the movie. I guess he was wrong to stay with Alvin Johnson down there. What did Alvin Johnson and him do? Alvin told you -- I think Alvin really told you the truth. He's the one said how scared he was getting in and out of that car, when they had that shotgun. He said they went and looked for a job, went and looked for work. Couldn't find any. He and his sister and them come up here with him. They were arrested. Alvin Johnson took the Sheriff and all of them back down here to get his clothes. Awfully nice of the Sheriff and them to go bring his clothes here to him. Of course, you and I know the reason they went to Jacksonville, was to find the gun. They haven't found it. That's really not material. You don't have to have the gun.

Dr. Byron Dawson testified. Richard King.

Roger Parien. Lee J. Sweat. Sheriff Noah Strickland. Weylon Yeomans. Jerry Abernathy. All of these individuals you have heard, some 32 of them. Which one of them has come up here and said he really lied? Even expert testimony like Roger Parien said it did come from a Colt. He don't know how many thousands or millions of Colts are made. Says, I cannot say positively, but in my opinion, it could have. That's just a mere opinion from an expert. Just a mere opinion as to how far when Morris Highsmith, he said his feet buckled in a hurry. His feet buckled in a hurry. But nevertheless he or no one else can tell how Morris Highsmith twirled or how long it took him to buckle or now far he fell. Start fall -- I'd start falling right here, and my head would land way up over yonder. No way to tell that.

Ladies and gentlemen of the jury, is there any direct evidence whatsoever that he intended to rob that place when he went in there? Was there any question? Let's say even if they did. I don't know what Mr. Highsmith said to him, or what the argument was about. But human nature would tell you it had to be something or this would have never happened. Would have never been a shooting. And if he had walked in there with a gun in his hand and said, "Give me your money," and if Mr. Highsmith said -- or Mr. Boatright said, "Here," said, "Lay down on the floor," tore the telephone out and took off just as easy. But there was

something went on in that place to make him go crazy. Was it that board you're going to look in Exhibit 13 and see Mr. Highsmith was fixing to get, right there? Was it because they called him a black-you-know-what? I don't know. Neither do you, really. We look at all this testimony, identification testimony, physical facts. . . flight he left to conceal hisself. All the questions of blood stains. So therefore, you not have what he has to say. That's all you've got. Is the credibility of his testimony. He was there as a witness. And I do not deny that there is sufficient evidence. If you believe the confession, if you believe this evidence. And I'd be the last one to stand here and tell you he would not be guilty of murder, under these circumstances, even if it happened just as he said. Both parties. I do question, ladies and gentlemen of the jury, and it is my duty to point out any defect regardless of how I feel or what I'd do. Because the Judge will charge you that the burden is upon the State to prove to you to a moral certainty and beyond a reasonable doubt, each and every material allegation in the indictment. Everything that is material must be proven beyond a reasonable doubt. And after you've heard the evidence and the law, if there is a doubt in your mind, or if it is wavering, then the law says that doubt shall be resolved in favor of the defendant. And he shall be acquitted. That means regardless of the guilt

or not. So Willie James Wilson, Jr. did shoot Alfred Boatright with malice aforethought. He shot Morris Highsmith. But I'm going to ask you ladies and gentlemen of the jury, in all fairness and honesty, in the name of justice itself to look at three -- count three of this indictment. Now, at the time he drove up to that station, I don't know if Terry had left or not. There was three people there subject to robbery, to be robbed. There was Sue Nell Boatright,and the evidence is undisputed and very clear that Sue Nell Boatrigh is the owner and operator of Boatright's Handi-Shop. The lease is in her name. The whiskey license is in her name. The beer license is in her name. And, her business license. Three license you've got to have in that store. All of the in her name because she had it leased from her daddy as the owner and operator of Boatright's Handi-Shop. So, if he had robbed Sue Nell Boatright as she coming out the door, the money in the cash register belonged to her. Anything . . h belonged to her. Did he rob Sue Nell Boatright individuall or doing business as Boatright's Handi-Shop? He is not accused of that, no. Same thing Morris Highsmith could hav been robbed. He could robbed Morris Highsmith at the pump, took anything off of him. Took his money, his watch, his r or one penny by the use of that weapon and he would have be guilty of armed robbery of Morris Highsmith. Did he rob Morris Highsmith? There's absolutely, unequivocally no

evidence that he robbed Morris Highsmith. Whose money did he take? Sue Nell Boatright's. The third person he could have robbed was Alfred Boatright. But to rob Alfred Boatright he's got to take his money off of him. Now, this indictment -- and you read it. You've got to prove every material allegation, with intent to commit theft, take property of value, to wit: approximately $90 in U.S. currency, the property of Alfred Boatright, from the immediate presence of Alfred Boatright by use of an offensive weapon, to wit: Ladies and gentlemen of the jury, there is not one piece of evidence in this record to show that he ever robbed Alfred Boatright. He took the money from Sue Nell Boatright. They should allege and prove -- that's what they haven't shown you. Took her money. He is not accused of robbing Sue Nell. She don't have to be there. They took her property from the store. It was her store, she was the owner of it. And technically and legally he is not guilty under this evidence of robbing Alfred Boatright of anything. He picked up and took the money of Sue Nell out of that store. Therefore, there's one thing for certain. Justice shall prevail. Only a verdict of not guilty of armed robbery will stand. Alfred Boatright. Cause I asked each one of the officers, "Did you inventory the property? Did you check it?" Only one agent ever tell -- Joe Sweat says yes. I think he told John Thigpen, says, "Yes, over at the hospital I did look in his

wallet. I got his driver's license out of it. I did look in Morris Highsmith's wallet and got his driver's license out of it." How much money did they have? Is there any evidence? And I asked that same question. Did you all find anything on him to connect him with taking one thing from Alfred Boatright? No.

Now the State has utterly proved -- and I submit to you, ladies and gentlemen of the jury, if you want to write a fair verdict, and in justice, he's not guilty of taking anything from Alfred Boatright except his life. Cannot stand here and deny that. There's no way, and I will not. He is entitled to a fair trial, and a just trial and it is your duty to give him that. And if the State failed to prove to you to a moral certainty and beyond a reasonable doubt the material allegations -- and the Judge is going to tell you. You listen to the Judge. It will be your duty to acquit the defendant on that charge. You've got to consider each and every charge.

And the mere fact that you read on down on that fact by use of offensive weapon, to wit: a pistol and during the commission of said offense did intentionally inflict serious bodily injury, to wit: the death of Alfred Boatright and Morris Highsmith by use of said offensive weapon. All of that is nothing more than hogwash in there that could increase the penalty. It does not have any

bearing upon whose property it is, or who's being robbed or any of that. That little part there gives a greater penalty, is all. And the Judge is going to charge you at this time that you're not concerned with punishment. You're not

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concerned. You're not to concern yourself with punishment whatsoever. You're not to concern yourself with punishment. You're to concern yourself with guilt or innocence of James, Willie James Wilson, Jr. on each count of this indictment. Look at it, consider it, and we ask you -- Fletcher Sams says we're trying to throw up a smokescreen. I conscientiously wonder, what smokescreen have we throwed up? I guarantee you, if me or -- John Thigpen, we weren't out there that day. We weren't called upon to go out. If we'd been invited out there to the scene, or -- of course, we weren't even involved at that time. Had no right. We might have knew who these Mexicans were that John was asking about. We had information, apparently, that they were in the area. We wanted to know who all they talked to, to see if anybody was out there. We were trying to search and find out --

MR. SAMS: I object, Your Honor. I hate to interrupt, but he's arguing facts that are not in evidence.

THE COURT: Well, what facts is he arguing that isn't in evidence?

MR. SAMS: He made a statement to the jury that they had evidence that there were Mexicans out there. There's been no evidence of that fact.

MR. PRITCHARD: I did not say that. I said

Mr. John Thigpen --

THE COURT: Let's find out what he said before I rule on it. What are you arguing to the jury then, Mr. Pritchard?

MR. PRITCHARD: It is my -- he argued that we throwed up a smokescreen because we kept asking about the Mexicans. I . . say we were searching for some Mexicans. If we had found them, we might have had them here. But please the Court, I submit that is a fact. It is. We've asked about the Mexicans. I think we have a right to explain it. That's all we were saying.

MR. SAMS: Your Honor --

THE COURT: No, sir, there's no evidence of any Mexicans involved in this event. I'm not going to let you argue that to the jury. That would be improper. That would go beyond any evidence that's been introduced in this case. There is no evidence in the record in this case, other than your leading questions to some State witnesses, which you always got a "no" answer to about Mexicans being involved, and I'm not going to permit you to argue that.

MR. SAMS: Thank you, Your Honor.

ARGUMENT BY MR. PRITCHARD, Cont'd.

Ladies and gentlemen of the jury, at any time have we endeavor to try to throw up a smokescreen by bringing any of them in here? Or anybody else? What type of lie have we tried to bring you, if we're throwing a smokescreen?

They say that Mr. Highsmith never had a gun in that place, but Sue Nell said he normally kept one with him down there. Sue Nell did, too. They clearly told you that we wouldn't be able to rebutt what they've said --

MR. SAMS: Your Honor, again, I hate to interrupt, but I object to another argument about a fact not in evidence. Sue Nell's statement was contrary to that. She was referring to Mr. Boatright. Not Mr. Highsmith.

MR. PRITCHARD: I fail to see his objection, if it please --

THE COURT: What are you arguing to the jury, Mr. Pritchard?

MR. PRITCHARD: Please the Court, right now if I'm going to keep being interrupted, I --

THE COURT: Well, just tell me what you're arguing, that he's objecting?

MR. PRITCHARD: I want to know what his objection is. That's what I'm trying to find out now.

THE COURT: State your objection, Mr. Sams.

MR. SAMS: My objection is, he just stated to

the jury that Sue Nell Boatright stated that Morris Highsmith often carried a gun at the store, and that is contrary to my recollection of the evidence.

THE COURT: Is that what you're arguing?

MR. PRITCHARD: May it please the Court, I'm -- like my -- I probably said that. I apologize to the jury. Sue Nell Boatright, and I'll challenge the record, says her father, Alfred Boatright, carried a gun and had it in that place on numerous and sundry times.

THE COURT: Proceed with your argument.

CLOSING ARGUMENT BY MR. PRITCHARD, Cont'd.

And I'll submit to you, the only thing that Morris Highsmith had was his stick there. Because I sure don't want to mislead you whatscever. I am apt to get Morris Highsmith and Mr. Boatright confused or mixed up. For God's sakes, don't hold that against that man and electrocute him for something I have to say, or do anything else to him. I hope you are not that gullible that Mr. Sams himself said you might be.

Now, ladies and gentlemen of the jury, I ask of you, as I have explained, and I do beg and I plead with you. Cive this evidence your serious consideration. I know what your verdict will be on the first two counts. The other one, I don't think, will stand up. But in all sincerity,

I hope, certainly you will not do what Deen Strickland really wants you to do. Convict him, if you must, for murder on the fact that he did shoot those two people. That he might have done it in a mad fit of temper at what Mr. Boatright said to him. But there is absolutely no evidence that he is a cold-blooded, callous person. I think the evidence is completely to the contrary. You seen him on the stand. He can't talk plain. And I imagine he did get in an argument with Mr. Boatright down there over the payment of that gas. And that's what caused the death of Alfred Boatright and Morris Highsmith.

One thing for certain -- the only thing I agree with Mr. Strickland and them on: that the truth will stand when the world's on fire. That is for certain. And then Mr. Strickland did say it's time for him to accept his responsibility. It's time for him to accept his responsibility. And you know, that's one thing we ask in all of our children, son or daughter, when you learn to accept your responsibility, then you are a man. Then you come to life.

I tell you ladies and gentlemen of the jury, he might not be a human being, he might be possessed of the devil, or whatever might have happened to him on that day, he has accepted his responsibility, and did accept his responsibility. Because he got on this witness stand and raised his hand to God Almighty and swore. He didn't have to look Sue Nell. She was back there. But the rest of the

Boatright family out here. He had to look out there and admit, say, "Yes, I didn't know he was dead." He had no way to know that their father was dead, because he was still living when he probably crossed the Florida line, he was still in the hospital. Could that be a lie? His own doctor -- you know, it took over an hour. He lived over an hour. Won't take that long to get him . . But he did accept his responsibility by taking this stand and saying, "Yes, I went in there. Yes, I did. We got in an argument and he said certain things. And when Mr. Morris Highsmith went down, I didn't know if he was going to get a gun or what." Most people do realize these small grocery stores do have guns behind the counter. He didn't have one that day, but there's no way for Willie James Wilson to know if he run out the door he might have shot him in the back. But certainly, he did not, as Deen Smith (sic.) Strickland said, execute them. He like to completely missed both of them. One of them in the arm. He didn't shoot them in the head. Because they were as close as I am right here to Mr. Popham. Just that close in there. You can't. No way possible. The two of them were as close as this lady to this one right here, to him. Right there in that six-foot area there, over that counter. Morris turned to the left. He turned to the left, and he was shot right here in this left shoulder. Like to have missed him when he went down. That would have been

about the angle of this thing. And at that time, as he fired here, Mr. Boatright standing by the cash register, he was turned, and he was shot here in the arm. Went in here and over here. Just that easy, turned -- bamm, bamm. He had to be bending over. But he did accept his responsibility.

I don't know if God's forgiving him or what He might do. I'm not asking and that's not the question here at this time. Right now, he has accepted his responsibility by telling the people in Pierce County, "I done it." So ladies and gentlemen, a man that's going to come in here and admit, "I fired the gun at them. I was mad when I did it." The District Attorney's office has got to still, right up to the very last, tell you he's lying. That takes gall and guts. I say he told you the truth. He admitted to you that he fired the shot that killed Boatright. He fired the shot that killed Morris Highsmith. And he's back here now to pay for it. That is accepting responsibility. Ladies and gentlemen of the jury, you accept your responsibility. Find him guilty of count one and two. But if you accept your responsibility, your verdict on count three of the robbery of Alfred Boatright -- I took his life, but I took nothing from him -- have to find him not guilty on that.

Thank you.

MR. STRICKLAND: Judge, can we approach the Bench?

We expect the evidence to show you before Mr. Boatright expired his life, that he made a telephone call. We expect to have the operator, who received that telephone call and who logged it, to testify of the contents of that telephone conversation. And we expect that the officers who arrived on the scene, that he made a statement to them before he was placed in the ambulance and brought to the Pierce County Hospital about what had happened to him.

When we show you that, ladies and gentlemen, we would ask this jury, you ladies and gentlemen, to return a verdict of guilty as to each count of this indictment. Thank you very much.

THE COURT: Mr. Pritchard, you may proceed on behalf of the Defendant.

OPENING STATEMENT BY MR. PRITCHARD:

Ladies and gentlemen of this panel, I think I've already introduced myself to you. I'm M. C. Pritchard. Along with myself and John Thigpen over here, we have been appointed to represent the defendant. And our main interest, and only interest, first of all as officers of this Court, we're just as much an officer of the court as your Sheriff or Mr. Strickland or any one else. It is our job to see that the Defendant is given a fair and impartial trial of a panel of jurors picked from his peers in this county. As you noticed, we did go through a very lengthy voir dire to obtain

a jury.

But at this time, I cannot tell you what the evidence is going to show. I do not know. I do know, and I do not deny and we will not question, that Alfred Boatright was murdered. He was killed here in this county. We will not deny that Morris Highsmith was killed. As far as the robbery's concerned, of course, that's the question of fact for the jury to determine -- all of these things.

But it's our job and our duty to see -- The Defendant is not required to produce any evidence whatsoever to prove he's innocent. First of all, under our Constitution of the United States and of Georgia, the burden's upon the State to prove to you to a moral certainty and beyond a reasonable doubt each material allegation in this indictment. The burden is upon them to prove to you.

And, ladies and gentlemen, the evidence that's required to prove this -- Mr. Strickland has stated to you what he intends to prove. You're going to take the evidence from the witnesses from this stand. And the Honorable Clarence Blount is going to charge you on the law. In a criminal case you are judges of both the evidence and the law. You take the evidence from this witness stand and the law from the Court. What I have to say is not evidence; what Mr. Strickland had to say is not evidence. But, he is required to prove each one of these items to a moral certainty and beyond a reasonable doubt.

First of all, he says I'm going to prove that he came here on Friday night, June 19, 1981, met with Irene. He met with Eric Miller which is no crime. They went out to the river, shot a gun, target practice. It's no crime whatsoever. The color of his car and his Gran Prix and this-that and the other, certainly no crime to drive a yellow Gran Prix. Certainly was no crime if he wanted to spend the night over there at Irene Adams' house, go to Hoboken, go to Waycross. No crime to go out here to 121 Club and buy a beer, or to drive by Mrs. Cooper's house or this house or the other house.

What we are concerned with, and only concerned with, is what happened at Bristol, Georgia, at Boatright's store around 4:00 p.m. on June 20th, 1982. All of this other stuff is really immaterial. But what we want to do is find out what happened there.

It is not, and should not ever be, a death penalty, or any other crime, when you have to shoot someone or in self-defense or other reasons or in justification. There was a killing took place. And I think you want to know what actually took place out there. But most of all, regardless we want to know exactly who did it. Not that this man, here, Willie James Wilson was present, or his car was there. He might be guilty of participating in a robbery.

It's my duty and Mr. Thigpen's sworn duty to determine if he pulled the trigger, and why he pulled the

trigger. Because ladies and gentlemen, first of all, you're going to hear all of this evidence. Like Mr. Strickland said, good number of witnesses. You could put a thousand witnesses up there, and I want to see the witness that identifies Willie James Wilson as the one that shot him.

A good bit of evidence. Well, of all of this other smokescreen that we might have about what happened out here and there, and all the exhibits, ladies and gentlemen, let's look very closely to each piece of evidence. How does it tie in to Willie James Wilson? That's what you're concerned with.

Because first of all, when you hear all this evidence and the charge of the law and these type things, you'll be called upon to determine whether he's guilty of murder -- Mr. Highsmith. Guilty or not of murdering Mr. Boatright. Guilty or not of the robbery.

And then, you will have another hearing, if you so find him guilty of that, to determine whether he lives or dies. So, for goodness sake, keep your mind clear. Right now he is innocent until proven guilty beyond a reasonable doubt regardless of what you think. And make sure, as I do, this is one time that we cannot afford to make a mistake. Because one of you, if this man is found guilty, is going to be required to sign his death warrant. So, listen to this evidence very closely. Very closely. Because at the end of

NO. 82-6852

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WILLIE JAMES WILSON, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether the Supreme Court of Georgia properly determined that the imposition of the death penalty in Petitioner's case was proper because the jury had found at least one constitutional statutory aggravating circumstance?

II.

Whether Georgia must more extensively explain the purpose and role of mitigating circumstances to the jury during the sentencing phase of the trial?

III.

Whether the individual actions and tactics of Petitioner's counsel at trial, an issue not raised on appeal below, should be reviewed by this court?

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ON PETITION FOR WRIT OF CERTIORARI
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BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF FACTS

Willie James Wilson, Petitioner, was indicted in Pierce County, Georgia during May, 1981 for the murders of Morris Highsmith and Alfred Boatwright, and the armed robbery of Alfred Boatwright. Following a trial by jury, Petitioner was found guilty on all counts. During the sentencing phase of Petitioner's trial, the jury recommended the sentence of death for each of the murders. The conviction itself was upheld on direct appeal to the Georgia Supreme Court.

Georgia law requires that a decision to impose the death penalty be authorized by the finding of at least one statutory aggravating circumstance. O.C.G.A. § 17-10-30; Ga. Code Ann. § 27-2534.1. In Petitioner's case, the statutory aggravating circumstances found by the jury were that the murder of Alfred Boatwright was committed while

the Appellant was engaged in the commission of two other capital felonies, i.e., the murder of Morris Highsmith and the armed robbery of Alfred Boatwright, and the murder of Highsmith was committed while the Appellant was engaged in a commission of two capital felonies, i.e., the murder of Morris Highsmith and the armed robbery of Alfred Boatwright.

In its review of the conviction the Georgia Supreme Court applied the doctrine of "mutually supporting aggravating circumstances", and set aside the statutory aggravating circumstance that the murder of Highsmith occurred during the murder of Boatwright. Wilson at 638. However, the Supreme Court of Georgia found that the remaining statutory aggravating circumstances were enough to support Petitioner's sentence of death and did not require the reversal of either sentence. Id. This petition for writ of certiorari seeks a review of that judgment of the Supreme Court of Georgia.

As a review of the facts presented at Petitioner's trial is necessary for this Court's determination of whether or not a petition for a writ of certiorari should be granted, a summary of the evidence admitted at Petitioner's trial is presented at this time for this purpose.

Petitioner, classified as a Private in the United States Army, left Ft. Stewart without permission during the middle of June, 1981, and did not return to base. (T. 2362, 2370, 2373). On the afternoon of Saturday, June 20, 1981, Petitioner was seen practicing his target shooting with a .38 caliber pistol he had taken, without permission, from his father. (T. 1439-40, 1459, 1462-4, 1466, 1469, 1568-69, 2358, 2380-82). Two days later, on Monday, June 22, 1981, Petitioner and Darris Miller drove to Hoboken, Georgia, where Petitioner filled out job application forms. (T. 1474-8, 1482-6, 1606, 1636-8).

Miller testified at trial that Appellant stated he "needed some money" and spoke about "hitting" a place. (T. 1608-9). Appellant removed his pistol from under the car seat, Miller inserted two shells into it, and Appellant replaced the weapon under the seat. (T. 1610-11, 1649). The men drove around looking around for a suitable place to rob. (T. 1609). Petitioner told Miller, "if he was to ever hit a place, he don't leave no witnesses." (T. 1611). Miller and Petitioner later separated. (T. 1611-12, 1616, 1659, 2404).

Boatwright's Handy Stop, located in Bristol, Georgia, had been owned by Alfred Boatwright, but in 1979 he had retired from the business and leased it to his daughter. He relieved his daughter, who was working at the store, at approximately 3:45 p.m. on the afternoon of June 22nd. (T. 1686, 1699). He was accompanied by his friend Morris Highsmith.

Petitioner contends that he went to the store to fill his car with gas, although he admits he didn't have enough money to pay for his purchase. (T. 2416). Petitioner then alleges that, after telling Mr. Boatwright he could not pay for the purchase, Petitioner and Boatwright began to argue. (T. 2160-61, 2364-66, 2423-24). Petitioner maintains that he then took his pistol from his pocket in an attempt to exchange it for gasoline. Mr. Highsmith began to duck behind the counter, and Appellant then began firing his loaded pistol because he feared that he would be hurt. (T. 2365, 2426, 2449). There is no question, and Petitioner has admitted, that he shot both Mr. Highsmith and Mr. Boatwright, and then took money from the store. (T. 2162, 2165-69, 2426, 2432, 2449).

The evidence presented by the state's case shows a different scenario. According to expert medical testimony, Morris Highsmith was instantly paralyzed by the shot fired from Petitioner's gun, and his body was found,

not behind the counter, but some distance from it, collapsed on the floor, with his chair tipped over on his legs. (T. 1744, 1746, 1751, 1895, 1918). Mr. Boatwright died within the hour, after managing to crawl from the middle of the floor to the telephone and call for help. (T. 1723-7, 1772-3, 1776).

Petitioner was arrested on June 30, 1981 in Hinesville, Georgia. (T. 1870-3). He was interviewed by the authorities at the Hinesville Police Department after being given his Miranda warnings and signing a waiver of rights form. (T. 2210-2, 2228, 2267-70). At a Jackson v. Denno hearing held at trial, the statement made by Appellant to the police was ruled voluntarily given. (T. 2110-2207). Appellant repeated his story when he testified at trial. (T. 2370-73). Further facts will be discussed as is necessary for consideration by this Court in determining whether the petition for a writ of certiorari should be granted.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE SUPREME COURT OF GEORGIA PROPERLY APPLIED GEORGIA STATE LAW, IN ACCORD WITH ZANT V. STEPHENS, 51 U.S.L.W. 4891 (U.S. Jun. 22, 1983), IN DETERMINING THAT THE IMPOSITION OF THE DEATH PENALTY IN PETITIONER'S CASE WAS VALID AND PROPER BECAUSE IT WAS AUTHORIZED BY AT LEAST ONE CONSTITUTIONAL STATUTORY AGGRAVATING CIRCUMSTANCE

Petitioner contends that the Supreme Court of Georgia, in reviewing Petitioner's sentence of death, erred in allowing that sentence to stand after invalidating one of the statutory aggravating circumstances relied on by the jury. Respondent submits that the Supreme Court of Georgia was correct in its decision and fully in accord with this Court's position as stated in Zant, Warden v. Stephens, 51 U.S.L.W. 4891 (U.S. Jun. 22, 1983).

This Court originally upheld the Georgia death penalty statute in Gregg v. Georgia, 428 U.S. 153 (1976). More recently, the statute has again come under the close scrutiny of this Court in Stephens, supra. The challenges to the Georgia statute in Stephens were almost identical to the challenges presented here by the Petitioner.

In Stephens, the petitioner alleged that a statutory aggravating circumstance allowed the jury too much discretion, which was forbidden by Furman v. Georgia, 408 U.S. 238 (1972). Additionally, the petitioner claims the Georgia statute violated Stromberg v. California, 283 U.S. 359 (1931) and suggested that the mere mention of an invalid statutory aggravating circumstance might require

that a death sentence be set aside. This Court then undertook a lengthy examination of the Georgia statute, including the certification of the following question to the Georgia Supreme Court.

> What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?

Stephens at 4893 n. 11. In response to this certified question, the Georgia Supreme Court set out clearly and concisely its interpretation of the Georgia death penalty statute. Zant v. Stephens, 250 Ga. 97 (1982). The Supreme Court of Georgia analogized the Georgia death penalty statute to a pyramid-type structure, where statutory aggravating circumstances could be used by the jury to raise from one level to a higher level those murders for which the death penalty may be considered. Id at 99-100. Once any statutory aggravating circumstance is found, it then becomes a question of the jury's discretion as in whether or not to impose the death penalty. Id. In reviewing the answer to this certified question, this Court specifically approved the Georgia statute as written and found it completely constitutional. Stephens, 51 U.S.L.W. at 4898 (U.S. Jun. 22, 1983).

The heart of Petitioner's Enumeration of Error No. 1 is that the Georgia death penalty statute violates both Furman and Stromberg. However, in this Court's most recent evaluation of the Georgia statute the Majority of the Court found no constitutional infirmity in the statute. Petitioner's argument on this point offers no new question of fact or law which this Court has not already dealt with in the recent case of Stephens. For

this reason, Respondent respectfully submits that the Supreme Court of Georgia has properly dealt with this issue and that there is nothing presented for the review of this Court.

II. THE PRESENTATION OF MITIGATING EVIDENCE AND INSTRUCTIONS THEREON TO THE JURY DURING THE SENTENCING PHASE OF PETITIONER'S TRIAL WAS SUFFICIENT TO GUIDE THE JURY IN ITS DECISION ON WHETHER OR NOT TO IMPOSE THE DEATH PENALTY.

The Petitioner also contends that the trial court's instructions to the jury were inadequate because they did not more fully explain the purpose and role of mitigating circumstances in the jury's sentencing decision. Respondent submits that the trial court's instructions on mitigating circumstances fully and completely complied not only with the requirements of Georgia law, but also with the guidelines established by the Eleventh Circuit Court of Appeals.

The law of Georgia requires that in all cases tried by a jury in which the death penalty may be imposed, a pre-sentence hearing must be held in which the jury may hear, and later consider, any mitigating or aggravating circumstances regarding the defendant and the crime involved. O.C.G.A. § 17-10-2; Ga. Code Ann. § 17-1503. However, the exact definition of what should be considered mitigating has been left open by the state legislature, meaning that the jury is empowered to consider as mitigating any of the evidence presented. Redd v. State, 242 Ga. 876, 252 S.E.2d 383 (1979). It is also clear that the jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court. Gregg v. Georgia, 428

U.S. 153 (1976). It is equally clear that where the trial court fails to charge a jury, in the absence of a request, on the law and existence of mitigating circumstances during the sentencing phase of the trial, the death penalty must be set aside. Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977). This entire procedure involving the Georgia death penalty statute was originally approved of in Gregg, and that approval has been most recently reiterated in Zant v. Stephens, 51 U.S.L.W. 4891 (U.S. Jun. 22, 1983). Indeed, in Stephens, this Court specifically and fully discussed the procedure of presenting aggravating and mitigating circumstances to the jury and explicitly found the statute constitutional. Id at 4894-95.

It is unquestioned that a defendant in a capital murder trial must be allowed to proffer, and a jury be permitted to consider, any evidence of mitigation submitted as a basis for a sentence less than death. Lockett v. Ohio, 438 U.S. 586 (1978). In most cases, this will mean that the judge must clearly and explicitly instruct the jury about the existence and function of mitigating circumstances and their option to recommend against death. Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. 1981).

The sentencing phase and jury instructions of Petitioner's trial fully complied with these legal requirements. At the sentencing phase, Petitioner presented extensive testimony by Petitioner's father and mother, his aunt, and his ex-wife. (T. 2664-2689). Petitioner himself took the stand and had ample opportunity to present any testimony he desired on his behalf. (T. 2689-2702). The trial court then began a lengthy charge regarding the possible sentences that could be imposed on the defendant. (T. 2689-2702). The trial court told the jury:

> [I]t is for you, the jury, to determine in this case, whether the defendant shall be punished by death or by imprisonment for life for the murder of Alfred Boatwright, and whether the defendant shall be punished by death or by imprisonment for life for the murder of Morris Highsmith.
>
> In reaching that determination, you shall consider all of the evidence, facts and circumstances of the case which have appeared at both the guilt-innocence phase and at this pre-sentencing phase of the trial of this case, including any and all evidence in extenuation, mitigation and aggravation of punishment.

(T. 2788-89).

The trial court then went on to discuss the statutory aggravating circumstances, and then cautioned the jury:

> In considering the penalty to be imposed upon the defendant for the murder of Alfred Boatwright, members of the jury, even if you should find one or more of the statutory aggravating circxumstances which I have just given you in the charge to exist beyond a reasonable doubt, you are not required to impose upon the defendant the death penalty for the murder of Alfred Boatwright, but you would still be authorized to, and may impose upon the defendant imprisonment for life rather than death.

(T. 2790-91).

This same explicit instruction about the jury's option to recommend against death was then repeated regarding the murder of Morris Highsmith. (T. 2691-92). After this, the trial court again cautioned the jury to consider any and all evidence, facts and circumstances in extenuation, mitigation and aggravation of punishment in their determination of the appropriate punishment for the Petitioner for the murders he had committed. (T. 2792, 2793, 2794). Neither the State nor the Petitioner had any objections to the charge at that time. (T. 2800). The jury returned a recommendation of the death penalty. (T. 2802-03).

It is clear from the record that Petitioner had extensive mitigating evidence presented to the jury during the sentencing phase of his trial. It is also clear from the record that the trial court adequately instructed the jury on their ability to recommend against the death penalty and to consider all mitigating and extenuating circumstances in the making of their decision. The trial court fully complied with all the requirements of both state and federal law in its actions. The overall structure and operation of the Georgia death penalty statute has been specifically and recently approved of by this Court, and there is no violation of that law present here. Therefore, Respondent respectfully submits that this issue presents nothing for review by this Court.

III. THE PARTICULAR ACTIONS AND TACTICS OF PETITIONER'S TRIAL COUNSEL, NOT QUESTIONED ON APPEAL BELOW, DO NOT CONSTITUTE PLAIN ERROR AND DID NOT AFFECT THE FUNDAMENTAL FAIRNESS OF THE PETITIONER'S TRIAL

Petitioner has raised an allegation, for the first time, that his trial counsel was guilty of gross misconduct in statements made during the closing arguments at the trial. Respondent submits that the issue of ineffective assistance of counsel should not be raised for the first time on appeal to this Court, but it if is considered, the trial counsel's action, which may be the result of counsel's tactical decisions, were correct, proper, and fundamentally fair to the Petitioner.

It is a well-established principle of law that this Court will not decide federal constitutional issues raised for the first time on review of state court decisions. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). Such questions which were not raised below are very likely to have an inadequate record, since it was certainly not compiled with those questions in mind, and in the federal system, it is very important that the state courts be given the first opportunity to consider the application of state statutes in light of any constitutional challenge. Id at 439.

Petitioner admits that this issue was not raised on appeal below but contends that it is such plain error that it should be raised and reviewed by this Court. However, it is not such plain error as the Petitioner contends. The Petitioner, who is seeking to overturn his conviction on grounds of ineffective assistance of counsel, must prove his entitlement to relief by a preponderance of the evidence. Washington v. Strickland, 693 F.2d 1243, 1250

(5th Cir. 1982); see also, Michel v. Louisiana, 350 U.S. 91 (1955). That burden has not been carried by the Petitioner either in the state courts below or in this Court.

There is no doubt, and Appellant admitted in open court, that he shot both Mr. Boatwright and Mr. Highsmith. (T. 2365, 2433-5). Petitioner's counsel had to deal with this confession in the method he thought was the best in his professional judgment. Our adversary system of justice requires that attorneys be permitted to exercise informed discretion in the conduct of the client's defense. Washington, at 1254, citing, United States v. DeCoster, 624 F.2d 196, 208 (D.C. Cir. 1976). If an attorney makes a stragetic choice to rely upon one line of defense rather than another, and that choice is based upon the exercise of professional judgment after a reasonable substantial investigation into all plausable lines of defense, the courts will find ineffective assistance of counsel only if the choice was so patently unreasonable that no competent attorney would have made it. Washington at 1254.

There is no information at all in the record as to whether Petitioner's counsel was pursuing some particular line of defense which he thought best in his professsional judgment. It could only be mere speculation to attempt to build a case of misconduct or incompetence based on such an incomplete record. Petitioner's counsel has not been given any chance to respond to such criticism and the state courts have been denied any chance of reviewing these state issues. For this reason Respondent respectfully submits that this issue presents nothing for review by this Court.

CONCLUSION

This Court should refuse to grant a writ of certiorai to the Supreme Court of Georgia, as it is manifest that no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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This 29th day of June, 1983.

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